Missouri Attorney General's Opinions - 1940

Opinion	Date	Topic	Summary
1-40	Apr 23	SCHOOLS.	County Court cannot discount or compromise a loan made out of the school funds.
1-40	Oct 18	ELECTIONS.	Certificates of nomination of Independent candidates signed by electors must be acknowledged and follow Section 10241 R. S. Missouri, 1929.
5-40	Jan 12	ELECTIONS. DOG LAW.	After the provisions of the law pertaining to taxation of dogs has been adopted same may not be abolished by later election.
5-40	June 13	RECORDER OF DEEDS.	When population of county exceeds 20,000, circuit clerk and recorder are separate, the recorder's office to be filled by election in 1942 and every four years thereafter.
5-40	Aug 15	MUNICIPAL CORPORATIONS. FEDERAL SURPLUS COMMODITIES CORPORATION. APPROPRIATION OF PUBLIC MONEYS.	Municipal corporations of the second class may appropriate public moneys to be used by Surplus Commodities Corporation to carry out the purposes for which that corporation was formed.
7-40	July 5	MUNICIPALITIES.	Motor Vehicle Fuel Tax Reports of Kansas City, Missouri, may be inspected, when.
8-40	June 13	HIGHWAYS.	Township Board has exclusive right to purchase material and make all necessary contracts in the expenditure of bond money in the construction and reconstruction of roads under Section 7946, R. S. Mo. 1929. Section 7963, R. S. Mo. 1929, also discussed. All expenditures over the sum of $500.00 must be a public letting.
9-40	Mar 6	TAXATION AND REVENUE. LEVY OF TAXES.	The levy for current county expenses and for the purpose of paying outstanding obligations may not be made by the county court in excess of the constitutional limit.
9-40	June 6	SHERIFFS.	Payment of salary to jailer or to sheriff out of county fund is not authorized.
10-40	Jan 23	STATE PARK BOARD. UNEMPLOYMENT COMPENSATION. CONCESSION OPERATORS IN THE	The fact that employers operate concessions in state parks does not release them for liability for unemployment compensation tax.

		PARK.	
10-40	Feb 15	LIQUOR.	Failure to keep an orderly house had not been made a punishable crime by Section 13139-z-24 of the Non-intoxicating Beer Laws.
10-40	Mar 4	PROSECUTING ATTORNEY. INSANITY HEARING.	Prosecuting Attorney should not accept appointment by the county court as attorney for an alleged insane person in an insanity hearing before the county court.
10-40	June 29	LOTTERIES. LIQUOR.	Dividend card plan used by merchants giving prizes in varying amounts after $10.00 worth of purchases are made, constitute a lottery and violates regulations of Liquor Department.
10-40	July 19	LIQUOR.	Package goods dealer cannot give samples of liquor to customers and allow same to be consumed on premises.
10-40	Aug 20	FOODS AND DRUGS.	Only licensed pharmacists may remove poisons from original package and dispense same in other packages.
10-40	Nov 26	GAME AND FISH. CONSERVATION COMMISSION. SALE OF RABBITS AT RESTAURANT OR CAFÉ.	Persons who serve rabbits for a charge are not included in the definition of the term “retail vendor” and not required to have a permit under Conservation Commission Code Section 37, subdivision (1).
11-40	Sept 17	RECORDERS.	Where chattel mortgages convey personal property, and also affecting real property, they should be recorded.
12-40	Jan 22	OFFICERS AND EMPLOYEES. WITNESS FEES AND EXPENSES.	Public officers and employees may be reimbursed out of the treasury for expenses instant to attendance in response to a subpoena, and whatever amount is collected by such officers as witnesses and for mileage should be turned into the state treasury.
12-40	Sept 17	ELECTIONS.	Form of application for ballot and envelope for return of ballot by absentee voter in army or navy.
12-40	Nov 20	ELECTIONS.	Ballots may not be counted for nominee, even though straight ticket is voted, where his name does not appear on ballot.
13-40	Nov 25	NUISANCES. CITIES OF THE THIRD CLASS.	Right of a city of the third class to declare a solicitor or canvasser a nuisance and to prevent him from entering upon private property.
14-40	Jan 23	TAXATION. TOWNSHIP COLLECTORS’ DUTIES. DELINQUENT TAXES.	The duties of township collectors in regard to collecting current and delinquent personal taxes.
15-40	Mar 4	RECORDER OF DEEDS.	Recorder may appoint deputies with consent of the County Court and

			may set a reasonable salary without consent of the County Court. Recorder should account for and turn into the County Treasurer all surplus fees at the end of each year.
15-40	May 15	COUNTIES.	Construction of Section 2922, R. S. Mo. 1929, authorizing issuance of bonds for funding prior county indebtedness.
15-40	Nov 22	MUNICIPAL CORPORATIONS.	Ordinance may be repealed when same does not interfere with vested rights.
16-40	Jan 5	COUNTY COURTS. TOWNSHIP TREASURERS. SETTLEMENTS.	County courts in counties under township organization may examine and approve settlements of township trustees.
16-40	Mar 7	TOWNSHIPS.	Special election to vote bonds for purchasing land and erecting building.
16-40	Sept 23	MOTOR VEHICLES. TAXATION.	Gas tax to be paid on gas sold to manufacturers under cost-plus contracts to U. S. Government.
17-40	Feb 19	TAXATION AND REVENUE.	A trustee appointed, under the provisions of Section 9953b, Laws of Missouri 1939, at page 851, may sell lands purchased at a third offering of delinquent tax lands under the provisions of Section 9953a, Senate Bill No. 311, Laws of Missouri 1939, only upon order of the County Court. Lands on which there were no bids at the offering provided in Section 9953a, supra, must be reoffered by the collector at least once every five years subsequent to the third offering to toll the statute of limitations.
17-40	June 22	PENAL INSTITUTIONS. GOVERNOR'S CONSENT TO TRANSFER.	The governor's consent to transfer of a prisoner from the Intermediate Reformatory to the Penitentiary may be given as a part of the governor's revocation of the prisoner's parole. With such consent, subject to the provisions of said Section 8475b, a prisoner may be so transferred.
17-40	Aug 12	PENAL INSTITUTIONS. CHANGING RECORDS.	Sentences are cumulative and not concurrent where prisoner, while at large on parole from the penitentiary, commits a second felony, is convicted on that charge and sentenced to the penitentiary. The first sentence must be served first. Incorrect prison records should be changed in such manner as to show the serving of sentences in the order of sequence required by law.
17-40	Aug 15	PENAL INSTITUTIONS. PRISONER RELEASED WHEN.	Convicted, sentenced, incarcerated, paroled. While at large on parole, committed second felony, and again convicted, sentenced, incarcerated. Served total time on first sentence, and paroled as to second one. First sentence must be served first.
17-40	Aug 30	SPECIAL ROAD	Organized under Article 9, Chapter 42, R. S. Mo. 1929. A special road

		DISTRICTS.	district not disincorporated until Section 8057, Chapter 42, R. S. Missouri, 1929, has been complied with.
17-40	Nov 15	BOARD OF POLICE COMMISSIONERS.	Member may not accept other offices without forfeiting position of member of Board.
18-40	Feb 12	COUNTY BUDGET ACT.	(1) Sections 1 and 2, Laws of 1937, page 422, are not repealed by Laws of 1939, p. 660; (2) Counties of under 50,000 can protest warrants and thus enable them to borrow money until taxes are collected.
18-40	May 8	JUSTICE OF THE PEACE.	When township is divided, justice becomes justice of the peace of the township in which he is thrown. One justice is to be elected in Lemay and Gravois townships in 1940.
19-40	Mar 7	Hon. Roy Coyne	WITHDRAWN
19-40	Apr 6	SCHOOLS.	Person elected school director can qualify if taxes have been paid on property in which he had an interest or which could have been assessed to him, even though the taxes be paid by another party.
19-40	Nov 18	TAXATION.	County Courts may compromise back taxes when value of land appears less than amount of taxes due.
20-40	Jan 3	COUNTY COURTS.	May pledge warrants to corporations authorized to accept pledge of same.
20-40	Jan 10	SCHOOL DISTRICTS.	Boundaries.
20-40	Jan 12	TAXATION.	Property of handwriting school not exempt from taxation under Art. X, Section 6 of the Constitution of Missouri.
20-40	Mar 27	SCHOOLS. ELECTION.	(1) No provision in election laws for a challenger for school election. (2) Elector entitled to vote at annual school election even though he has moved to another state and back again to his original residence.
20-40	Apr 10	AGRICULTURE. STATE VETERINARIAN. DIPPING SHEEP.	State Veterinarian may issue order requiring dipping of sheep.
20-40	Oct 4	COUNTY WARRANTS.	Mandamus lies to compel county collector to accept warrant together with interest in payment of county taxes.
20-40	Nov 28	ROADS AND BRIDGES.	1941 revenue cannot be used to take care of 1940 outstanding warrants in the road and bridge and special road and bridge fund; special road districts are entitled to the funds of their districts upon timely application.
20-40	Dec 5	AGRICULTURE. DAIRY PRODUCTS.	Section 29, page 202, Laws of Missouri, 1939, prohibits cream buyers from paying a bonus or premium in addition to the posted price; Commissioner of Agriculture may promulgate reasonable rules

			consistent with the dairy products act.
20-40	Dec 10	AGRICULTURE. APPROPRIATION FOR CONTROL OF BANG'S DISEASE. AUTHORITY OF COMMISSIONER TO ENTER INTO CONTRACTS CONCERNING SAME. LIABILITY OF THE STATE ON ACCOUNT OF SUCH CONTRACTS.	Under the Act of 1939, Commissioner of Agriculture should make new contracts in regard to the control of Bang's disease. Since Legislature made no appropriation for payment for indemnity then the commissioner would not be authorized to enter into a contact and if he does the State would not be liable thereon.
20-40	Dec 18	COUNTY CLERKS.	May not sell insurance covering county property as agent of an insurance company.
21-40	Jan 13	COLLECTORS. SALARIES AND FEES. COLLECTING DRAINAGE DISTRICT TAXES.	Commissions allowed collectors for collecting drainage district taxes.
21-40	Feb 1	ROADS. OVERSEERS. OBSTRUCTIONS TO HIGHWAYS.	The powers and duties of road overseers in regard to removal of driveways or crossings over ditches connecting highways with private property.
21-40	Apr 3	CRIMINAL LAW.	Under Section 4304 R. S. Missouri, 1929 venue of criminal action in county or state where property was obtained. Under Section 4305 R. S. Missouri, 1929 venue in county or state where check was drawn, uttered or delivered.
21-40	May 7	TAXATION AND REVENUE.	1. Form of Deed approved by State Tax Commission proper. 2. Collector shall execute such deeds. 3. Two or more lots sold to same purchaser or purchasers all such parcels shall be included in one deed.
21-40	Nov 26	TAXATION.	Construction of Classes One, Two and Three of Sec. 183, R. S. Mo. '29 – the sale of tax certificates and the delivery of collector's deed is not affected by the administration of estates.
22-40	Jan 24	MUNICIPAL CORPORATIONS. ELECTIONS.	To disincorporate a city of the fourth class, petition must contain two thirds of qualified voters and not two thirds of registered voters.

23-40	Jan 15	MUNICIPAL CORPORATIONS. RESIGNATION OF COUNCILMAN.	No vacancy is created in office until officer's resignation is accepted, construction of statute 6973 R. S. Missouri, 1929.
23-40	Feb 14	INSANE. SHERIFF.	Costs of transportation of State Hospital chargeable to county or patient's estate. Fees of Sheriff for transportation of insane person to hospital.
23-40	Feb 21	CRIMINAL COSTS.	In conviction for manslaughter under murder indictment the county is liable for the costs and not the state.
26-40	Feb 6	THE STATE. MUNICIPAL CORPORATIONS.	Arms of the state government are not bound by ordinances of municipalities pertaining to zoning districts.
27-40	Jan 15	STATE TAX COMMISSION.	Powers and duties of the State Tax Commission in regard to the enforcement of the revenue laws.
27-40	Mar 22	FRANCHISE TAX.	(1) Right of domestic corporation to allocate portion of capital outstate depends upon facts. (2) Goods sold on consignment are not employed in business in foreign state so that capital so tied up can be allocated.
27-40	Aug 28	TAXATION. SITUS OF TRUST PROPERTY FOR TAXATION.	Trust property held by two trustees living in different counties shall be assessed in the county in which the trust funds are located and one of the trustees resides.
27-40	Sept 9	TAXATION. ASSESSMENT. INTERSTATE BUS AND TRUCK.	The State Tax Commission has power to assess property of common carrier interstate bus and truck lines because they are public utilities, but does not have power to assess property of contract hauler interstate bus and truck lines because they are not public utilities.
27-40	Oct 7	RECORDER OF DEEDS. DEEDS OF TRUST.	In the event foreclosure proceedings are instituted by one or more bondholders, when the bonds are secured by a deed of trust, only those bonds need be produced to recorder of deeds under the statute.
27-40	Oct 10	JUSTICES OF THE PEACE. CRIMINAL PROCEDURE. CHANGE OF VENUE.	Trials in justice courts for misdemeanors must be held in the township in which offense was committed. Justice of the peace is not authorized to send the case to another township and if it is done the justice of the latter township has no jurisdiction to try the case and if it is tried and appealed to the circuit court, the circuit court has no jurisdiction of the case.
27-40	Oct 11	Hon. Melvin Englehart	WITHDRAWN
27-40	Dec 13	PROSECUTING ATTORNEY.	Prosecuting attorney-elect cannot assume office prior to January 1 if he is leaving December 15th, nor can he appoint a deputy under such

			circumstances. The present prosecuting attorney can continue to hold office until his successor qualifies and assumes office.
28-40	Feb 16	TAX AND REVENUE.	Lands sold at the third publication in the years of 1937 and 1938 are not affected by Senate Bill 311, Laws of Mo. 1939, with reference to making such sales final. Deeds are to be made under provisions of Sec. 9957, Laws of Mo. 1933.
28-40	Mar 14	LIQUOR. COUNTIES.	A county cannot charge and collect a license fee from distillers whose premises are not located within such county.
28-40	June 27	COUNTY COURTS. COLLECTORS.	Contract made by county court and collector giving ten per cent contingent fee to attorney for collecting delinquent liquor license and merchants' license taxes is illegal.
30-40	Jan 5	SCHOOLS.	Interpretation of meaning of "incidental expenses" as same appears in Section 13a, Laws of Missouri, 1939, page 718.
31-40	Jan 13	CRIMINAL LAW.	Violation of Section 7774, Subsection (c) Laws of Missouri, 1939, page 519-520 is a crime and a criminal prosecution will lie against either buyer or seller. Buyer and seller commits crime when no title to an automobile is passed.
31-40	Jan 25	CRIMINAL LAW.	The drawer of a check upon a bank in which he has no funds, under certain circumstances is guilty of a felony under Section 4304 R. S. Missouri, 1929. Form of information.
31-40	Feb 29	Hon. Arkley Frieze	WITHDRAWN
32-40	Feb 10	COUNTY COURTS. PAYMENT OF JUDGMENTS.	County court may be compelled by mandamus to issue warrants in payment of judgments if money for payment of same is available.
32-40	Feb 21	CRIMINAL LAW.	A criminal action may be filed against a tavern owner who maintains a public nuisance under Section 4347.
32-40	Apr 3	PEDDLERS.	Each employee selling wares of bakery at retail from truck must have state license and may be required to get county license if court so orders.
33-40	Feb 7	MOTOR VEHICLES.	Owner of body retains certificate of title when motor is sold.
33-40	June 12	ELECTIONS.	Voters may write in name of committeeman although declarations have been filed and candidates' names appear on ballot.
34-40	Mar 1	ADMINISTRATION.	Public Administrator is agent of the Probate Judge. Personal property must be sold before real estate to pay debts and legacies. An estate escheating to the state is subject to inheritance tax return.
35-40	Jan 17	CRIMINAL LAW. MINES – MINING.	It is a misdemeanor to employ any child under the age of sixteen years to work in a mine or underground work.

35-40	Feb 7	ELEEMOSYNARY INSTITUTIONS.	An idiot cannot be committed to the State Industrial Home For Girls.
35-40	Feb 15	TAXATION AND REVENUE.	Trustee appointed by County Court, under Section 9953b, purchasing lands for the tax funds, does not include trustees for private individuals. Sale by such trustee eliminates the city tax lien of City of Chillicothe for particular years involved.
35-40	Apr 12	DRAINAGE DISTRICT BY THE COUNTY COURT.	There is no provision by statute for the dissolution of a drainage district organized by the county court under Article 2, Chapter 64 R. S. Mo. 1929, and it may not be dissolved except by statute.
35-40	Apr 25	LOTTERIES.	Card "Win the Bank" on which lines are drawn through numbers, and persons having the highest total receiving a prize is a lottery under Sections 4314 and 4315 R. S. Mo. 1929.
35-40	May 10	OFFICERS – COUNTY TREASURERS.	Right to refuse payment of warrant until contest of election suit has been determined.
35-40	Sept 13	LIQUOR CONTROL.	Act does not prohibit sale of liquor in original package over telephone even though seller delivers and collects off the licensed premises.
35-40	Nov 25	TAXATION AND REVENUE.	County court may compromise delinquent taxes on real estate before offered for sale, and also for deficiency sales under the provisions of 9953a and 9953b, Laws of Mo. 1933, in event of redemption thereunder and provided, that such sales were consummated before such statutes were repealed.
35-40	Dec 9	Hon. Charles S. Greenwood	WITHDRAWN
36-40	Mar 22	ELECTIONS.	Nominees for office in city of third class under alternative form of government.
37-40	Feb 6	Hon. Ellsworth Haymes	WITHDRAWN
37-40	Feb 9	MARRIAGE LICENSES.	In discretion of recorder whether or not applicants for licenses are required to appear personally.
37-40	Feb 20	PENSIONS. STATE SOCIAL SECURITY COMMISSION.	Regulation refusing to permit persons 65 years of age to file application for six months is unreasonable and contrary to law.
37-40	May 14	ELECTIONS.	County Clerk prepares and delivers ballots used in primary and general elections. County Clerk publishes notices of calling of primary election. County Clerk publishes notice showing the nominees for offices. Board of Election Commissioners publishes notice of general election.

37-40	June 1	ELECTIONS.	In counties over 150,000 population having registration of voters county clerk prepares and delivers ballots.
37-40	Aug 16	EXTRADITION. AFFIDAVIT BEFORE MAGISTRATE. AFFIDAVIT RE PECUNIARY INTEREST.	The sheriff of a county or any other party having no pecuniary interest should be permitted to make an affidavit before a magistrate, and the affidavit regarding pecuniary interest, for interstate rendition purposes.
37-40	Sept 20	ELECTIONS.	County Clerks should furnish ballots in counties having a population of more than 150,000.
38-40	Jan 4	TAXATION. COLLECTOR OF REVENUE. RECOVERY OF EXCESS COMMISSIONS. WHO MAY BRING SUIT FOR.	The county is not authorized to bring suit for excess commissions paid to the collector by taxpayers.
38-40	Jan 4	RECORDER OF DEEDS.	Required to settle with county court at the end of each year.
38-40	Jan 23	COUNTY BUDGET ACT.	Section 17, Laws of Missouri, 1939, page 660, applies only to counties having a population of over 50,000 inhabitants.
38-40	Jan 25	ELECTIONS. BOARD OF ELECTION COMMISSIONERS. COMPENSATION OF ASSISTANTS.	Board of election commissioners in certain cities may fix the compensation of assistants and provide whether such compensation shall be for calendar days or for days which assistants are actually on duty.
38-40	Apr 2	SPECIAL ROAD DISTRICTS.	County Court should make every effort to comply with the terms of Section 8026, R. S. Mo. 1929, and proceed to appoint commissioners.
38-40	Apr 19	SCHOOLS.	State Superintendent of Schools has a right to withhold equalization quota funds from districts which do not employ teacher having 50 hours college credit.
38-40	May 1	SOCIAL SECURITY.	Money received from sale of containers must be placed in relief fund and must be appropriated.
38-40	May 11	LIQUOR. BONDS.	No authority given to compromise and settle liquor bonds. State must accept $2,000.00 in the event of a violation, or nothing, if law is not violated.
38-40	June 25	ELECTIONS.	Challengers and watchers in City of St. Louis must be appointed by Chairman or presiding officer of the chief managing committee of each political party having representation on the Board of Election Commissioners.

38-40	Sept 26	COUNTIES. FEDERAL SURPLUS COMMODITIES CORPORATION. APPROPRIATION OF PUBLIC MONEYS FOR.	County Courts may appropriate public funds to Surplus Commodities Corporation to carry out the purpose for which that corporation was formed, provided, the funds are available and not in conflict with the provision of the County Budget Law.
38-40	Nov 12	COUNTY CLERK.	Appointee to fill vacancy serves until general election only.
39-40	Jan 3	ELEEMOSYNARY INSTITUTIONS.	Method of payment to State Hospitals for support of patients committed as habitual drunkards or drug addicts.
39-40	Nov 27	STATE CANCER HOSPITAL. RESIDENCE.	No specified length of time required to establish a new residence. Where new residence established by patient, must be recertified and county of patient's new residence becomes liable for future support.
40-40	Jan 4	TAXATION AND REVENUE.	I. Cities of special statutory charter must certify their delinquent taxes on real estate to the county collector for collection unless the charter provides a special scheme of collection by a city collector. II. General taxes on real estate become delinquent on January 1st, annually, and county collector shall proceed to enforce the lien of the state thereon and may charge the fees incident thereto.
40-40	Jan 30	SCHOOLS.	Member of the Board of Education convicted in Federal County is not disqualified from remaining in office.
40-40	Mar 15	TAXATION AND REVENUE.	Length of time Jackson County Board of Equalization may remain in session.
40-40	June 20	ELECTIONS. PRIMARY.	Candidates can make affidavits for withdrawal of names as candidates for office in primary, anytime prior to printing of the ballot.
41-40	Jan 5	PUBLIC SERVICE COMMISSION. MOTOR VEHICLES.	Annual license fee of interstate motor vehicles under Section 5272, Laws of Mo. 1931.
41-40	Jan 22	BANKS & BANKING.	Interpretation of Senate Bill No. 312, Laws of Mo., 1939, p. 758. Amounts of state bonds and municipal bonds that may be held without limitation.
41-40	Feb 16	TAXATION AND REVENUE.	Lands purchased by a trustee appointed under Section 9953b are held by such trustee for the sole purpose designated by said statute and does not affect paramount or Junior tax liens assessed and levied for years subsequent to the years for which the land was sold to such trustee.
41-40	Feb 24	INITIATIVE PETITIONS. ELECTIONS.	Corporations may contribute money to secure signers on initiative petitions for Constitutional amendments.

		CORPORATIONS.	
41-40	Mar 8	TAXATION AND REVENUE.	Failure of certificate holder to have executed and recorded a deed within four years from the date of sale, under the provisions of Section 9954c causes the amount due such purchaser to cease to be a lien on the lands and lots for the particular years involved.
41-40	May 1	TAXATION.	Town and village delinquent real estate taxes are to be collected by County Collector. He must accept list certified to him even though late and must sell to satisfy lien even though the state and county taxes are not delinquent.
41-40	Oct 1	LOAN COMPANIES.	When Finance Commissioner has authority to revoke or refuse to issue license to "Small Loan" company.
41-40	Dec 31	COUNTY SCHOOL SUPERINTENDENT'S SALARY.	Change in salary caused by change in population becomes effective at the beginning of the term year.
42-40	Jan 19	LIQUOR.	If applicant for a non-intoxicating beer license pays proper fee to county and meets other license requirements, the county court must issue a license.
42-40	Mar 26	FINES AND PENALTIES.	Procedure for instituting suit to recover fine where a part of the proceeds go to a private informer.
42-40	Oct 7	CITIES OF 4TH CLASS.	Illegality of part of proposed ordinance.
43-40	Jan 6	MUNICIPALITIES.	Hannibal cannot license non-resident towel service business.
43-40	Jan 26	CEMETERIES. CITIES OF THE FOURTH CLASS.	Authority of cities of the fourth class to control cemeteries.
43-40	Feb 6	TOWNSHIP ORGANIZATION – SCHOOL.	Township Collector must pay moneys directly to Treasurer of Consolidated School District under Section 9340, R. S. Mo. 1929. Section 12321, R. S. Mo. 1929, discussed.
43-40	Mar 15	BURIAL SOCIETIES.	The right of burial societies to solicit and receive members over the age of sixty-five years.
43-40	Sept 4	CRIMINAL PROCEDURE. PERFECTING APPEALS. EXTENDING TIME.	Application for extension of time made to trial court in felony cases within six months period. If made thereafter, should not be ruled on; should be made in Supreme Court.
44-40	Apr 13	ELECTIONS. VILLAGES.	Board of trustees may determine qualifications, election and returns of members.
45-40	Jan 4	ELEEMOSYNARY	Board of Managers not liable for torts of its agents. Superintendent

		INSTITUTIONS.	liable to patient for property entrusted where lack of reasonable care is exercised.
45-40	Jan 12	PENAL INSTITUTIONS.	The Record Clerk of the penitentiary must follow the law in classifying the prisoner for service of two sentences, one of which was for the conviction on a case while a convict.
45-40	Feb 8	ELEEMOSYNARY INSTITUTIONS.	State Eleemosynary Institutions must accept indigent insane who are certified under Sections 8652 and 8652a.
45-40	May 29	PENSIONS, BLIND.	The Commission may accept bequests, and how same may be expended.
45-40	Aug 17	COUNTY COURT.	Judges not entitled to mileage when they sit as members of the county board of equalization.
45-40	Aug 29	MUNICIPAL CORPORATIONS. TOWNS AND VILLAGES.	Sections 6948 and 7108, R. S. Mo., 1929, Sections 11 and 12, Article X of the Const. of Missouri, construed as to limitations of tax levy on cities, towns and villages.
46-40	July 13	ELECTION JUDGES.	Voter must make oath required by Section 10313 before judge is authorized to mark ballot.
49-40	Feb 23	TAXATION AND REVENUE.	1. Trustee has right to bid less than amount of taxes and cost. 2. County may order land sold for less than taxes and costs. 3. Purchase by trustee does not affect subsequent assessment and levy. 4. Deed indexed grantor by Collector to trustee. 5. State Tax Commission has prescribed and promulgated forms.
49-40	May 4	SCHOOLS.	Under Laws of Missouri, 1939, Section 9233, page 707, when it becomes necessary through lack of funds, tuition can be paid from teachers' fund. (Opinion to Mr. E. S. Trantham, September 9, 1939, overruled.)
49-40	Aug 30	SCHOOLS.	In deducting money received from state distribution only that amount distributed for teachers' fund and incidental fund should be deducted from the money estimated to be received from the utilities.
49-40	Sept 6	COUNTY TREASURER.	Abolishing Township organization, in counties operating under township organization law, ends term of County Treasurer and Ex Officio Collector.
50-40	Feb 2	MUNICIPAL CORPORATIONS.	Cities under thirty thousand under the Constitution may issue a specific levy for a water system, but the general law in all cities is that the bonds must be paid out of the revenues of the water or light system.
51-40	Jan 11	BONDS. COUNTY COURTS.	Liable for payment of premiums covering officer's entire term of office when consent and approval made to election of officer to give surety bond.

51-40	Jan 26	PENAL INSTITUTIONS.	The Department of Penal Institutions should not pay the expenses of maintaining an insane inmate of the State Industrial Home for Girls who was transferred to State Hospital No. 1 at Fulton.
51-40	May 6	SCHOOLS.	County Superintendent is entitled to traveling expenses outside of the county in certain instances.
52-40	Feb 12	SCHOOLS. STATEMENTS OF VALUATION FURNISHED BY WHOM.	It is the duty of the county superintendent of schools to furnish statements to the district clerks showing the assessed valuation of the district.
54-40	Jan 2	NOTARIES PUBLIC.	An acknowledgment of a collector to deeds for land sold at a tax sale taken by a deputy collector in his capacity as notary public is valid.
54-40	Mar 29	HOSPITALS. TUBERCULOSIS.	Article 6, Section 36 of the Constitution does not so invalidate the terms of Article 2, Chapter 120, R. S. Mo. 1929, that a county tuberculosis hospital cannot be built and maintained.
54-40	Dec 20	CORONERS.	County liable for fees of coroner's inquest over body of deceased, dying in County of Coroner as result of injuries received in another County.
55-40	Jan 22	INSURANCE.	Approval of articles of association of Washington Fire and Marine Insurance Company.
55-40	Feb 3	INSURANCE.	Mutual stipulated premium companies can not be licensed. Charters of insurance companies are not forfeited because of non-user.
55-40	Feb 15		Letter to Hon. Ray B. Lucas
55-40	Feb 23	INSURANCE.	Approval of amendment to Articles of Association of the Washington Fire and Marine Insurance Company.
55-40	May 2	INSURANCE.	Mutual insurance companies in existence prior to the year 1899 can become stipulated premium companies without capital stock.
55-40	Aug 17	INSURANCE.	2% gross premium tax on life insurance companies cannot be collected when company is no longer licensed even though some business remains in force.
55-40	Dec 31	INSURANCE.	Disapproval of Articles of Association of the Kansas City Casualty Company for failure to supply affidavit of proof of publication.
56-40	Jan 2	CREDIT UNIONS.	Authorized to invest funds under provisions of Section 5598a, Laws of Missouri, 1939, page 217.
57-40	Jan 3	SHERIFF.	Entitled to mileage in more than one case where the same witness is used in more than one case.

57-40	Jan 24	COUNTY SHERIFFS.	Discretionary powers of selecting jail under Section 8545, R. S. Mo. 1929, where county has no jail.
57-40	Jan 26	CRIMINAL LAW.	Voluntary surrender of evidence to a sheriff who has no search warrant is admissible in evidence.
57-40	Feb 2	MISSOURI DAIRY LAW.	Creamery may refuse to buy cream from any producer so long as it does so on its own initiative and does not combine with others to refuse to buy milk products.
57-40	Feb 13	SALES TAXES.	Constable may not refuse to serve execution until he is paid for such service. A refusal to serve the same when it is delivered to him would render him and his bondsmen liable.
57-40	Feb 28	DEPARTMENT OF AGRICULTURE. EGG INSPECTION.	Rules and regulations prescribed by the Department of Agriculture for the enforcement of the egg inspection laws.
57-40	Mar 28	CONSERVATION COMMISSION. CONVEYANCE IN TRUST.	Conditions under which Conservation Commission may become possessed of lands in Newton County, Missouri, conveyed in trust to the Izaak Walton League.
57-40	May 8	COMMISSION MERCHANTS.	Cooperative marketing associations are not subject to the provisions of the statute applicable to commission merchants.
57-40	May 11	AGRICULTURE.	Moniteau County Agricultural and Mechanical Society property incorporated and eligible for State aid.
57-40	July 17	Hon. G. Logan Marr	WITHDRAWN
58-40	Jan 24	BUILDING AND LOAN ASSOCIATIONS.	(1) Effect of voluntary liquidation upon charter; (2) and reorganization of corporation that has voluntarily liquidated but not dissolved.
58-40	Jan 25	BUILDING & LOAN ASSOCIATIONS.	Supervisor may, without resorting to legal process, take charge of an association and its assets and manage and conduct its business.
58-40	Feb 9	MOTOR VEHICLES.	Lessee or renter of automobiles for a period of ten days successively is considered the owner of a motor vehicle and must register the same.
58-40	Feb 24	BUILDING AND LOAN.	Association which is member of Home Loan Bank cannot borrow in excess of ten per cent from an outside source.
58-40	Feb 24	BUILDING AND LOAN.	Association may not purchase stock in another association.
58-40	Apr 15	TAXATION.	Board of Education may fix tax under levy voted by people.
58-40	Apr 26	BUILDING AND LOAN.	Association must follow reorganization plan even though it is expeditious to ignore same.
58-40	May 29	BUILDING AND LOAN.	Withdrawing shareholders are entitled to dividends.

58-40	July 13	BUILDING AND LOAN.	Association may not take out life insurance on borrower.
58-40	Sept 24	ASSESSORS. BUILDING AND LOAN ASSOCIATIONS.	County assessor has right to inspect list of shareholders in building and loan association.
58-40	Sept 25	BUILDING AND LOAN.	Only borrower with no shares pledged entitled to cast vote.
59-40	Jan 6	COUNTY CLERKS.	Need not account to the county for fifteen cents service charge permitted by Conservation Commission.
59-40	Feb 9	INFORMATION AND INDICTMENTS.	It is necessary for the prosecuting witness to endorse his name on an indictment but not necessary that it be endorsed by him on an information.
59-40	May 15	TAXATION.	Husband and wife must make separate return for property owned by entirety and as individually owned.
59-40	June 18	LABOR.	Section 13218 R. S. Mo. 1929, applies to retail mercantile establishments.
59-40	July 11	OFFICERS.	Census increase may cause increase in salary of public official without violating Section 8, Article XIV, Missouri Constitution.
59-40	Dec 21	TAXATION AND REVENUE.	In the assessment of lands for general county and state taxes and all subsequent proceedings to foreclose the lien therefore, the description of such lands and lots must be sufficiently definite to lead to identification.
60-40	Jan 8	TOWNSHIP ORGANIZATION. ROADS, HIGHWAYS & BRIDGES.	Commissioner of Special Road Districts – how selected under Section 8063, R. S. Mo. 1929.
60-40	Jan 18	TAXATION.	The County Assessor receives payment on one list which contains both personal property and real estate of each person in the county.
60-40	Jan 19	CRIMINAL LAW.	State is liable for costs on a plea of guilty in a felony case, even if the defendant is paroled from the bench.
60-40	Mar 26	ARMORIES. CRIMINAL LAW.	Commander of Missouri National Guard has right to make reasonable rules and regulations governing state armories. Statute prohibits drinking intoxicating liquors at a lawful public assemblage.
60-40	May 31	ARMORIES. MUNICIPAL CORPORATIONS. POWER TO LEVY TAXES FOR MAINTENANCE OF	Municipal corporations, for the purpose of maintaining armories owned by the state, may levy taxes, or with the consent of two-thirds of the legal voters thereof issue bonds for that purpose.

		SAME.	
60-40	Sept 10	SCHOOLS.	Only resident pupils may be counted in determining teaching units for state apportionment of funds.
60-40	Dec 14	STATE BONUS ACT.	Wife of a deceased veteran not living with him at the time of his death, and not divorced is entitled to bonus under Section 3 of the Bonus Act; she may waive rights and the next person in legal succession may make application.
62-40	Jan 12	Hon. Stephen J. Millett	WITHDRAWN
62-40	Feb 16	AGRICULTURE.	AAA not required to register for sale of fertilizer.
62-40	Feb 21	TAXATION.	Power of trustee appointed under Sec. 9953b, Laws of Missouri, 1939, pp. 851-852, to enter into contracts of sale.
62-40	Feb 23	TAXATION AND REVENUE.	1. Trustee may bid up to total amount of taxes, interest, penalties and cost. 2. County court may not, by order, control trustee in bidding.
62-40	Apr 18	ELECTIONS. COUNTY AUDITOR.	May be candidate for another office without resigning as County Auditor.
62-40	Dec 6	SHERIFF ST. LOUIS COUNTY.	Appointment of deputies, and salaries.
63-40	Feb 29	ELECTIONS.	Person can include nickname along with real name in filing for offices.
63-40	Mar 26	Hon. Alfred F. Moeller	WITHDRAWN
63-40	Mar 28	HIGHWAY PATROL. MOTOR VEHICLES. STOLEN PROPERTY.	Motor vehicles seized by highway patrol should be held by them subject to the order of the court having jurisdiction of the offense in connection with which they are seized.
63-40	Nov 22	COUNTY JUDGE'S QUALIFICATIONS. MORTGAGOR UNDER SCHOOL FUND LOAN.	The fact that a county judge elect has school funds borrowed from the county does not disqualify him from being elected as a county judge.
63-40	Dec 17	CIRCUIT CLERKS.	Deputy circuit clerks are appointed by the circuit clerk and approved by the circuit judge subject to discharge at any time.
65-40	Jan 13	Mr. Julius T. Muench	WITHDRAWN
65-40	Mar 19	Hon. Maurice L. Mushlin	WITHDRAWN
66-40	June 6	TAXATION.	Part of cemetery tract that is used for caretakers house is not taxable.
66-40	Aug 26	TAXATION.	Personal property obtained by federal agency through foreclosure not

			exempt from general property tax.
66-40	Sept 10	ASSESSOR.	County Assessor without authority to make an assessment of property ordinarily exempt from General Taxes which lies within an incorporated sewer district under the provisions of Laws Missouri 1933-34.
67-40	Feb 9	LIQUOR. MONOPOLIES.	Association of brewers cannot through agreement or concerted action refuse to sell beer to any dealer or group of dealers. Such an agreement would be in violation of the anti-trust laws.
67-40	Mar 15	Hon. C. Roy Noel	WITHDRAWN
67-40	May 2	LIQUOR. CORPORATIONS.	Liquor Control Act contains no provisions for service of process against foreign brewing corporations.
67-40	Sept 7	DEAD HUMAN BODIES. CORONER.	(1) Duty of coroner having custody of dead body found floating in stream or river, to notify secretary of anatomical board as to disposition; (2) If unfit for anatomical purposes, may direct coroner to dispose of same by burial; (3) Must exercise reasonable discretion as to place of burial; (4) Coroner obligated to pay undertaker.
67-40	Dec 2	INTOXICATING LIQUOR.	Brewers and wholesalers giving money and property to retail dealers for bottle tops redeemed violate Section 3 and Section 13139-z-14.
68-40	Mar 8	LIBRARIES. COUNTY LIBRARY DISTRICTS.	Only city, village and township libraries organized as provided by Article 5 of Chapter 99, R. S. Mo. 1929, are exempt from provisions of act forming county library districts.
68-40	Mar 26	TAXATION AND REVENUE.	Levy voted for county libraries must be kept within the limitations set out in Section 11 of Article 10 of the Constitution of Missouri.
68-40	Apr 12	CORONERS. STATE ANATOMICAL BOARD.	Control of deceased persons to be buried at public expense.
68-40	Aug 23	COURTS OF RECORD. PROBATE JUDGE.	Under Section 11772, p. 679, Laws of Missouri 1939, a circuit judge holding court in two or more counties is entitled to $1300 salary as jury commissioner, and a probate judge may retain as part of his fees up to the amount of $1300 in addition to the other salary allowed circuit judges.
68-40	Sept 12	LOTTERIES.	Trading stamp scheme with prize determined by chance is lottery.
69-40	Jan 25	CONTRACTS.	Substantial change in a contract which, in effect, did away with the time limit provisions by implication of law gave reasonable time for performance of such work.
69-40	Feb 6	TAXATION.	Surplus in sinking fund must be applied to retirement of bonds and cannot be placed in general revenue until indebtedness is paid.
69-40	Apr 25	HEALTH.	Health Board should submit evidence of violations of law regarding

		PUBLIC WATER SUPPLY. CRIME. PUBLIC NUISANCE. ELEEMOSYNARY.	public water supply to Prosecuting Attorney and institute prosecutions; should submit evidence of public nuisance regarding water supply to Prosecuting Attorney or Attorney General. Water furnished by penal eleemosynary boards not supervised by health board.
69-40	May 1	BOND ISSUES.	Funds raised to pay bonded indebtedness cannot be transferred and applied to the payment of general indebtedness.
69-40	May 1	BOARD OF HEALTH. COSMETOLOGISTS, HAIRDRESSERS AND MANICURISTS. RECIPROCITY.	Board of Health may issue licenses of reciprocity without examination to cosmetologists, hairdressers and manicurists if any such applicant is either duly licensed in another state or has practiced for at least five years.
69-40	May 22	HOTELS.	Board of Health has no authority to require fire escapes on fireproof hotels in Kansas City.
69-40	Sept 20	MUNICIPAL CORPORATIONS.	City of third class cannot pass ordinance requiring prescription for the sale of sulfanilamide and barbiturates.
70-40	May 8	CRIMINAL COSTS.	Fees of state's witnesses should be paid by the state or county in a continuance where the costs are taxed against an insolvent defendant.
71-40	Jan 18	LIQUOR.	Liquor control act does not apply to Federal Military Reservations.
71-40	Jan 18	LIQUOR BONDS.	A new liquor bond cannot be required of a liquor dealer before resuming business after a suspension of his licenses unless a court has prior thereto declared the bond forfeited.
71-40	Feb 5	LIQUOR.	Manufacturers of 5% beer who also sell as wholesalers must secure four licenses from Supervisor of Liquor Control.
71-40	Dec 3	SHERIFFS.	When entitled to commitment fees from county.
72-40	Feb 13	COUNTY HIGHWAY ENGINEER, EX-OFFICIO.	In counties which have voted against the application therein of the provisions of Article 8, Chapter 42, R. S. Mo. 1929, as provided by secs. 8019 and 8020 thereof, the compensation of the ex-officio county highway engineer is governed by said sec. 8020, and the other provisions of said Article 8, including sec. 8011 R. S. '29 as amended L. 1939, P. 674 Mo. Stat.Ann.P. 6829 do not apply.
72-40	Apr 2	PUBLIC WAREHOUSES.	Determination of Liability of Bondsmen.
72-40	Dec 19	CITIES.	City council cannot lend surplus funds to school districts.
73-40	Jan 30	BARBERS' BOARD OF EXAMINERS. BRANCH OFFICES.	State Barber Board not authorized to rent branch offices.

73-40	Feb 8	CITY COUNCILMEN. SPECIAL ROAD DISTRICT.	(1) In cities less than ten miles from county court councilmen cannot vote for road commissioner by proxy. (2) Councilmen and other officers may change vote for commissioner prior to final appointment by order of record.
75-40	May 20	MUNICIPAL CORPORATIONS.	City of Fourth Class may enact an ordinance prohibiting gravel pits in the city limits which endanger the safety and health of the citizens of the city.
76-40	Jan 20	MOTOR CARRIERS. PUBLIC SERVICE COMMISSION.	Public Service Commission without authority to require foreign interstate carriers to comply with license section relating to foreign corporations doing business within state.
76-40	Jan 23	Hon. T. E. Roberts	WITHDRAWN
76-40	Aug 20	MUNICIPALITIES.	Richmond Heights under 1940 Census entitled to three councilmen. How appointed and term.
76-40	Aug 26	COUNTY BUDGET ACT.	County clerk may purchase office machines and other supplies not of an expendable nature provided costs were included in his budget and approved by county court. The purchase should be made out of the funds of class 6; funds can only be transferred from classes 1, 2, 3 and 4 to class 5 during the year. Any other transfer should be made at the close of the fiscal year.
77-40	Aug 17	COUNTY COURT.	May not sponsor a project to build for an association an engine house to be located in an unincorporated area of St. Louis County, Missouri.
78-40	Feb 21	ADMINISTRATION.	Mortgaged land is an estate on which letters of administration should be granted. The Probate Court has no right to require security for costs except in the circumstances stated in Sec. 1238 R. S. Mo., 1929, Mo. Stat. Ann. Page 1466.
80-40	Mar 16	SHERIFF.	When entitled to additional fees and mileage for resubpoenaing witnesses after first trial resulted in a hung jury.
80-40	Aug 31	PENAL INSTITUTIONS. ¾'S RULE. WHEN IT APPLIES.	Under the present statute, a convict confined in the penitentiary cannot be deprived of the benefit of the three-fourths rule established by Section 8442 R. S. 1929 on the ground that he previously, while confined in the Intermediate Reformatory at Algoa, was incorrigible or escaped. A person confined in the Intermediate Reformatory may be held there for the full period of his sentence.
80-40	Sept 5	EXTRADITION FROM CANADA.	Of person convicted of robbery whose sentence has not been executed, effected by: application by governor for requisition; requisition by United States Sec. of State; judicial proceeding in Canada; order of surrender.
81-40	Feb 6	SALES TAX.	Automobiles sold in Missouri by a local agent for a Nebraska principal,

			to be delivered in Nebraska, are not subject to sales tax in Missouri.
81-40	Feb 6	INSPECTION OF FACTORIES, WAREHOUSES, ETC.	State Commissioner of Labor has no authority under Section 13218, R. S. Mo. 1929, to inspect a nursery.
81-40	Mar 5	LABOR. WOMEN. WORKSHOP. OUTSIDE WORK.	Sec. 13210 R. S. Missouri, 1929, Mo. Stat. Ann. Page 4776, does not apply to female employees doing stenographic and clerical work in a general office where no sales are made but where reports from local retail stores are assembled and consolidated; said sec. 13210 does not apply to female employees doing outside sales work.
81-40	Mar 19	MOTOR VEHICLES.	Employees of WPA operating motor vehicles in the transportation of persons or property are not required to provide themselves with a chauffeur's or registered operator's license.
81-40	May 31	LABOR DEPARTMENT. EMPLOYMENT OF CHILDREN. MUNICIPAL OPERA, ST. LOUIS, MISSOURI.	Children participating in play, "The American Way," under the supervision of their mothers, does not violate Section 14087, R. S. Mo. 1929.
81-40	June 25	MOTOR VEHICLES.	Trailers belonging to political subdivisions are exempt from registration.
81-40	Nov 19	COUNTY AUDITOR. SHERIFF.	(1) May presently resign effective on day names; (2) Governor cannot make prospective appointment effective on day named in resignation; (3) Form of resignation. (4) Has authority to select bailiffs to attend upon court; (5) Forbidden to enter into special contract as to compensation.
81-40	Nov 27	AUTOMOBILE LICENSE.	Person may purchase either new or duplicate license plates in case of loss by theft or otherwise.
81-40	Dec 9	COUNTY SURVEYORS.	A county surveyor, upon being appointed county highway engineer, in counties containing less than 50,000 inhabitants and in which the County Highway Engineer Act is in effect, is entitled to retain his fees as surveyor as well as to receive his salary as highway engineer. The same is true in counties having a population between 20,000 and 50,000 after January 1, 1941.
81-40	Dec 11	RECORDER OF DEEDS. DUTIES CONCERNING CANDIDATES' AFFIDAVITS AND COUNTY COMMITTEE'S REPORT ON	Recorder of Deeds only required to file candidates' affidavits and political committee's reports in his office, for which no charge may be made.

		CONTRIBUTIONS AND EXPENDITURES.	
81-40	Dec 14	Hon. L. N. Searcy	WITHDRAWN
82-40	Feb 10	RECORDER OF DEEDS.	Loss by theft of county funds on account of burglary.
83-40	Jan 8	CIRCUIT COURT REPORTER.	Salary in 31st District.
83-40	Jan 11	TAXATION.	Chapter 59, Article 17, providing for taxation of merchants, must be followed and no other method under any other chapter should be followed for this purpose.
83-40	Jan 11	PENSIONS. OLD AGE ASSISTANCE.	Judgment for old age assistance for 1937 and 1938 may be paid out of the appropriation for the payment of old age assistance or pensions for the years 1939 and 1940.
83-40	Jan 17	COUNTY COURTS.	Salary of county courts in counties having 75,000 inhabitants and less than 90,000 inhabitants.
83-40	Mar 8	CRIMINAL LAW.	Information under Section 4014 R. S. Missouri, 1929, should contain the term “malice aforethought” and if not a part of the information upon acquittal the county should pay the costs.
83-40	Mar 15	PENSIONS. OLD AGE ASSISTANCE.	Under Section 16, Page 736, Laws of 1939, the State Social Security Commission is unauthorized to suspend monthly payments pending appeal for a hearing.
83-40	Apr 3	STATE AUDITOR. SCHOOLS.	Under Section 2917, R. S. 1929, the State Auditor is compelled to certify the amount of tax needed for the payment of coupons, but it is not his duty to make the levy; such duty falls on the school board.
83-40	Apr 15	TAXATION. SALES TAX. RURAL ELECTRIFICATION ASSOCIATIONS.	Rural Electrification Associations which purchase current at wholesale should collect the sales tax from their members or consumers to whom they sell current.
83-40	Apr 30	COUNTY BUDGET ACT.	Balance for printing financial statement and not budgeted can only be paid out of surplus or transferred from other classes. Amended Act of 1939, page 656, does not change the liability of the county clerk as budget officer on his bond. Also the same liability on the county clerks of counties of population over 50,000, under Section 20, Laws of 1933, page 340 et seq.
83-40	May 16	INSURANCE. COUNTY COLLECTOR.	County Collector pays insurance tax under Section 5978a. Laws of Missouri, 1939, page 461, to State Treasurer, general county revenue and school fund in same proportion as taxes are now distributed for real estate.

83-40	June 3	CRIMINAL COSTS.	Acquittal or dismissal of a case charging larceny of an automobile, tires or parts of an automobile of the value of more than thirty dollars charges the costs to the county and not the state.
83-40	Dec 19	COUNTY TREASURERS.	County treasurers are the insurers of all moneys coming into their hands and are not relieved of such responsibility by Section 12198, R. S. Mo. 1929, unless there is a substantial compliance with Article IX, Chapter 85, R. S. Mo. 1929, notwithstanding said funds are held by the bank as trustee ex maleficio.
84-40	Apr 10	COUNTY COURT.	Does not have jurisdiction over construction of dams to create lakes on private property.
85-40	Feb 27	GRAND JUROR.	Fees as a witness in other proceedings.
85-40	July 28	MUNICIPAL CORPORATIONS. NUISANCES.	Construction of Section 7202, R. S. Mo. 1929 – Cities of the fourth class have right to abate nuisances and issue special tax bills against the property for the expenses incurred.
86-40	Feb 15	SCHOOL DISTRICTS. TAXATION. EXTENSION OF BOUNDARIES.	Property in territory included in extension of boundaries of school district is liable for taxes assessed and levied thereon from and after the date of such extension.
86-40	May 15	HIGHWAY COMMISSION. ROADS.	Commission may allow coal company to mine state highway.
86-40	Nov 20	STATE HIGHWAY COMMISSION.	Powers to admit utilities to right-of-way.
86-40	Dec 3	SCHOOLS. NEPOTISM.	Article XIV, Section 13, relating to nepotism, is not violated by the appointment by a school director of a relative within the fourth degree who later marries during her term of employment.
87-40	Sept 23	Hon. W. W. Sunderwirth	WITHDRAWN
88-40	Apr 25	TAXATION. MUNICIPALITIES. CITY HOSPITAL PROPERTY. EXEMPTION.	Property donated to or owned by city of the third class for a city hospital is exempt from taxation.
90-40	Jan 20	COUNTIES. REDUCTION OF COUNTY TREASURER'S SALARY.	County Court has right to reduce treasurer's salary.
90-40	Oct 24	ELECTIONS.	Whether or not students may vote, depends upon facts and

		VOTERS – RESIDENCE – QUALIFICATIONS. STUDENTS.	circumstances of each particular voter.
92-40	Dec 17	COUNTY TREASURER.	Term expires on April 1 in counties under township organization.
93-40	Jan 27	CHATTEL MORTGAGES. MOTOR VEHICLES.	The meaning of the term "their distributing dealers" as used in Section 3097A, Laws of Missouri 1939, page 278.
93-40	Feb 9	ELECTIONS – PRIMARY.	Township committeemen and committeewomen elected in August Primary hold office until following August Primary, although township should be divided between both primaries.
93-40	Nov 25	SCHOOLS.	Teacher, after obtaining judgment for salary, can compel directors of the district to levy special levy to pay judgment, if it is not in excess of the constitutional limit.
94-40	Jan 17	MORTGAGES AND DEEDS OF TRUST.	Recorder of Deeds of City of St. Louis must record trustee's deed under a foreclosure, where the note presented at the time was unpaid and gave the trustee authority to foreclose and give trustee's deed.
96-40	Feb 28	MUNICIPALITIES.	May not discriminate between residents and non-residents on license tax; may transmit water to persons outside corporate limits through pipes not owned by the city.
96-40	Dec 16	CORONERS.	May perform autopsies only at inquests where a jury is called.
97-40	Jan 23	COUNTY COURT.	May vacate additions in unincorporated towns so that assessment will be by acreage rather than town lots.
97-40	Feb 8	COUNTIES. WARRANTS. JUDGMENTS. PRIORITY OF PAYMENT.	Various questions relative to the payment of county warrants and of judgments obtained on county warrants and as to the priority of such judgments over such warrants discussed.
97-40	Nov 20	SALARIES. CENSUS. OFFICERS.	1940 census will not cause change in the salaries of county officers during the year 1940.
97-40	Dec 11	MUNICIPAL CORPORATIONS.	A city of the Fourth Class may issue bonds to erect a library building.
98-40	Jan 2	STATE TREASURER.	Disposition of certain moneys paid into state treasury.
98-40	Jan 4	SALARIES AND FEES. CIRCUIT CLERKS.	Salary of the Clerk of the Circuit Court of Jackson County is fixed by Section 11820, R. S. Missouri 1929.
98-40	Jan 4	STATE TREASURER. LIQUOR BONDS.	Amounts received from forfeited bonds of retail liquor dealers belong to county public school funds.

98-40	Feb 13	COUNTY COURT. REFUNDS. TAXATION.	Returning of taxes, by the County Court, under illegal levy.
98-40	May 25	SCHOOL DISTRICTS.	Common school districts may change site only at annual meeting.
98-40	Sept 13	APPROPRIATIONS.	Section 44c of Article IV, of the Constitution of the State of Missouri, constitutes an appropriation for the payment of principal and interest on Soldier Bonus Bonds without legislative action.
98-40	Nov 28	TAXATION AND REVENUE.	Collector may make record of redemption of certificate when redemption thereof is made and the certificate holder has no further interest therein.
99-40	Jan 26	Hon. Carl F. Wymore	WITHDRAWN
99-40	Mar 27	AGRICULTURE. PAYMENT FOR NEAT CATTLE CONDEMNED ON ACCOUNT OF TUBERCULOSIS. IN WHAT COUNTY.	County court in the county in which the owner resides liable for the payment for neat cattle which are condemned on account of tuberculosis.
99-40	June 7	FICTITIOUS NAMES.	More than one person may register the same fictitious name.
99-40	July 10	Hon. J. E. Woodmansee	WITHDRAWN
99-40	Aug 27	ELECTIONS. CORRUPT PRACTICE ACT.	Candidate should include in expenses obligations incurred by others known and authorized by him; (2) candidate changing headquarters from one locality to another must include expense of both headquarters in statement; (3) expense of raising funds should be included in the statement.
99-40	Dec 7	PROBATE JUDGES.	Probate judge appointed by the governor holds office until the next general election, and in the event of his defeat for the unexpired term relinquishes the office after the general election.

SCHOOLS: County Court cannot discount or compromise a loan made out of the school funds.

April 23, 1940

4-73

FILED
1

Mr. A. R. Alexander
Conciliation Commissioner
Clinton County
Plattsburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated April 12, 1940, which reads as follows:

> "Our prosecuting Attorney, Mr. D. E. Bennett, of Clinton County, tells me that some weeks ago he asked the opinion of your office concerning the power of the County Court to assent to a compromise settlement of a school fund loan, when the debtor had filed a petition in the Federal Court under Section 75 of the Bankruptcy Act - the section providing for Farmer Relief.
>
> In this connection it was understood that he should invite your attention to the latest decision of the United States Supreme Court upon that section, namely in the case of Kalb et Ux vs. Feuerstein et Ux, 60 Supreme Court Reporter, page 343.
>
> Mr. Bennett tells me your opinion has not yet reached him. I happen to be interested in your opinion because I am the Conciliation Commissioner before whom the hearings are held.

"The real question is: Can the County Court consent to a Composition or Extension of time as to an overdue school fund loan, when the debtor has sought relief under said Section 75 of the Bankruptcy Act, as all other creditors may?

In view of the intentions of said Section 75, and in the light of the Kalb decision, supra, and other decisions, I had thought the County Court might do so, but I feel that your opinion may be clarifying as to the doubt that has arisen, and as the Creditor's Meeting has been adjourned to April 22nd, I am hopeful that your opinion may be supplied at an early date."

I am enclosing an opinion rendered by this office on August 24, 1938, to Honorable Glen W. Huddleston, Prosecuting Attorney of Carroll County, Carrollton, Missouri. In that opinion we held that the county court cannot discount or compromise a loan made out of the school funds.

In your request you mention the case of Kalb et ux v. Feuerstein et ux., etc., 60 Sup. Ct. Rep., 343, l.c. 348. In that case the court said:

"The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution

> of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property -- to the extent based upon the court's actions -- were all without authority of law. Individual responsibility for such unlawful acts must be decided according to the law of the State. We therefore express no opinion as to other contentions based upon State law and raised by appellees in support of the judgments of the Supreme Court of Wisconsin."

This case merely holds that state laws cannot be enforced which violate the Frazier-Lemke Act. This case does not effect our previous opinion, but, under Section 9243 R. S. Missouri, 1929, which is set out in our previous opinion, it will be noticed that it specifically is stated that "it is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest * * * *." In order that the county court can preserve a school loan, it will be necessary that where the mortgagor has taken advantage of the Frazier-Lemke Act the county court would not be violating Section 9243, supra, by extending the loan even though due. The county court, by extending the loan would be preserving the loan, which would be a first mortgage on the farm in question after a full settlement in the bankruptcy court. This loan would be a preferred account in the bankruptcy court. Under the enclosed opinion the county court could not compromise the loan even though the compromise would bring more money than if the farm was foreclosed at a later date.

CONCLUSION.

In view of the foregoing authorities, and enclosed opinion, it is the opinion of this department that the

county court may extend a loan which is past due when the mortgagor has taken advantage of the Frazier-Lemke Act.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

ELECTIONS: Certificates of nomination of Independent candidates signed by electors must be acknowledged and follow Section 10241 R. S. Missouri, 1929.

October 18, 1940 10/19

FILED 1

Hon. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion as to the validity of the following petition which has been filed in your office, for the purpose of placing the name of E. C. Clary on the ballot as an Independent candidate for constable of Washington township, Buchanan County, Missouri:

> "We, the undersigned voters, Washington Township, Buchanan County, Missouri, respectfully petition that the name of E. C. Clary be listed on the official Missouri ballot as an independent candidate for constable, Washington Township, Buchanan County, Missouri. We further promise to vote for and support E. C. Clary."

Under this petition are the required number of names of voters.

The two statutes to be considered are Section 10232 R. S. Missouri, 1929, which is as follows:

> "Any primary election as hereinafter defined, held for the purpose of making nominations to public office, and

> also electors to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination, executed with the formalities prescribed for the execution of an instrument affecting real estate."

And, Section 10241 R. S. Missouri, 1929, which reads as follows:

> "The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent. of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made; provided that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

It appears under the first section above that the primary requirement of a certificate of nomination signed by electors is that it be executed with the formalities prescribed for the execution of an instrument affecting real estate. This provision has been discussed in State ex rel v. Lesueur, 136 Mo. 452, l.c. 459, as follows:

> "By the terms of our statute, section

> 4757, Revised Statutes, 1889, a certificate of nomination by electors must be 'executed with the formalities prescribed for the execution of an instrument affecting real estate.' By section 2408, Revised Statutes, 1889, the certificate of acknowledgment shall state the act of acknowledgment and that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the instrument as a party thereto. Unless the petition was properly certified by the requisite number of electors the secretary had no right to file it and place the ticket on the official ballot. State ex rel. v. Lesueur, 103 Mo. 253; People ex rel. Klinker v. Board Pol. Com'rs, 31 N. Y. Supp. 469; People ex rel. Oliver v. Board Pol. Com'rs. 31 N. Y. Supp. 467."

You do not mention in your request that any acknowledgment whatever appears on the petition on file in your office and under consideration. If such acknowledgment does not appear the petition is fatally defective under the above authorities.

There appears to be another fatal defect in the petition. A reading of Section 10241, supra, discloses that all signers of the petition must declare that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office. The petition submitted to us contains only the statement that the signers of the petition will support the candidate named.

In State ex rel Preiss v. Seibel, 246 S. W. 288, a similar petition was under scrutiny by our Supreme Court. What is now Section 10241 R. S. Missouri, 1929,

has been carried forward from former revisions of our statutes and was carried in the statutes of 1919 as Section 4811, being identical with the former, except that at that time only one per cent of the electors residing within a political division of the State must sign the certificate of nomination. We find the following in the opinion of the Court: l. c. 293.

> "Section 4811 provides for the nomination of candidates for public offices otherwise than by a primary election. If electors resident within a district or political division of the state, to a number equal to 1 per cent. of the entire vote cast at the last preceding election in the state, county, or other political division, desire to nominate one or more candidates for public offices, to be filled by election, the right to nominate them and have their names printed on the ballots is guaranteed in the manner prescribed by this section of the statutes. The candidates so nominated may be those already nominated by one or more of the political parties, so that under this section electors may nominate candidates of the various political parties, and have their names printed on the ballots. This authorizes electors to act independently of all political parties. In other words, a ticket so nominated would be a nonpartisan or nonpolitical ticket. The only restriction upon such nomination is that the electors so signing a certificate of nomination must declare in the certificate that they are bona fide supporters of the candidates sought to be nominated, and have not aided and will not aid in the nomination of any other candidate for the same office." (Underscoring ours.)

CONCLUSION.

In view of the foregoing authorities, and for the reasons above stated, it is the conclusion of this department that the petition in the form set out in your request for an opinion is insufficient because it does not appear to be acknowledged by the electors who signed the same and because the signing electors have not declared that they did not aid in the nomination of any other candidate for the same office.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

_____

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

ELECTIONS:
DOG LAW:

After the provisions of the law pertaining to taxation of dogs has been adopted same may not be abolished by later election.

January 12, 1940

1-15

FILED
5

Honorable Latney Barnes
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question of whether or not it is possible for an election to be had for the purpose of abolishing what is commonly known as the dog law.

Article 11 of Chapter 88, R. S. Missouri 1929, together with the amendments that have been added thereto, contains the provisions of the laws of Missouri which relate to the taxation of dogs in this state. Under Article 12 of said chapter provision is made for the adoption by local option elections the provisions of the dog tax law.

Section 12881 of said article provides in part as follows:

> "* * * * * * * * * Provided that upon the filing of petition signed by one hundred or more householders of any county and presented to the county court at any regular or special session thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question, as to whether or not there should be adopted the law, creating a license tax on dogs, submitted to the qualified voter, to be voted upon at the next elec-

> tion. Upon the receiving of such petition it shall be the duty of the county court to make an order as herein recited, and the county clerk shall see that there is printed upon all ballots to be voted at the next election the following:
>
> "For creating a license tax on dogs--
>
> Yes. No.
>
> (Erase the word you do not wish to vote.)
>
> "The returns of said election upon said subject shall be opened, canvassed and certified, as the returns for general elections. If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall become operative from the time such publication is made."

By this part of said section it will be seen it sets up the plan whereby the provisions of the dog law may be adopted by an election by the people in the particular county in which it is proposed that the dog law be effective.

In our search through the statute pertaining to this subject we fail to find where the lawmakers have made any provisions for an election to do away with the provisions of the dog law after it has once been adopted. In fact the last part of said Section 12881 seems to indicate that the lawmakers, when this legislation was passed, had in mind that if the people

in the particular county adopted the law, then it would remain the law of that county until the Legislature changed it. This view is supported by the statement in said section, which reads as follows:

> " * * and such law shall become operative from the time such publication is made."

For authority to hold an election, the party calling the election must point to some statute authorizing such call and election. In Volume 20 C. J., page 95, at paragraph 76, the rule on authority to hold elections is stated:

> "In all popular forms of government the power of a majority to bind the minority by a popular vote depends upon the fact that the elections are held by virtue of some legal authority, and an election held without affirmative constitutional or statutory authority is universally recognized as being a nullity. * * * * * * "

In the case of State ex rel. v. Ellison, 271 Mo. 123, the Supreme Court announced the rule that, "No election can be held unless provided for by law,"

And in the case of The State ex rel. McHenry v. Jenkins, 43 Mo. 261, the rule is stated as follows:

> "Where the law made no provisions for the election of clerks of courts in 1868 an election held in such year is wholly void although there was an admission to hold the regular election in 1866."

CONCLUSION.

Since the lawmakers have made no provision for an election to repeal the provisions of the dog law

in counties which have adopted it by election, then under the foregoing authorities it is the opinion of this department that in counties which have adopted by local option the provisions of the dog tax law there is no authority to call and hold an election for the purpose of repealing the dog tax law in that county.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

RECORDER OF DEEDS: When population of county exceeds 20,000, circuit clerk and recorder are separate, the recorder's office to be filled by election in 1942 and every four years thereafter.

June 13, 1940

6-28

FILED
5

Miss Evelyn Barclay
Circuit Clerk
Adair County
Kirksville, Missouri

Dear Miss Barclay:

We are in receipt of your request for an opinion, dated June 4, 1940, as follows:

> "As you probably know the 1940 Census of Adair County may go over 20,000 and if so the Recorder of Deeds office will be vacant, as I am now serving as Ex-Officio Recorder of this county. If this should happen would you please give me your opinion as to when this would be effective, that is, when would an appointment be made and what procedure would I have to take as the Circuit Clerk of this County."

At its 1933 session, the state legislature repealed a major portion of the laws then existing in regard to the office of recorder of deeds in the various counties of the state, and enacted several new sections. Those with which we are concerned are found in Laws of Missouri, 1933, at page 360, and are as follows:

> "Sec. 11526. Office of recorder of deeds. -- There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

> "Sec. 11528. Circuit clerks to serve in certain counties. -- The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 20,000 inhabitants or more."

The first question presented is whether the legislature, by the use of the words "containing 20,000 inhabitants or more", intended these sections to apply to only such counties as contained that population in 1933, or whether it was intended that the guide should be the result of the census thereafter taken.

In State ex inf. Crain v. Moore, 98 S. W. (2d) 17, our Supreme Court en banc concurred in the following language of an opinion by Judge Ellison, l. c. 24:

> " * * * Section 11528 thereof provides there shall be a separate office of recorder of deeds in each county in the state 'containing 20,000 inhabitants or more.' Section 11528 says the clerks of circuit courts shall be ex officio recorders in their respective counties 'except in counties containing 20,000 inhabitants or more.' The two sections obviously refer to counties which from time to time contain the specified populations. That valid classifications of counties may be made on a population basis is well established. There is no merit or substance to this contention. Davis v. Jasper County, 318 Mo. 245, 300 S. W. 493, 495." (Italics ours)

It is obvious that a change in the population of the various counties may work a separation or combination of the offices of circuit clerk and recorder of deeds, and it becomes necessary to consider just when this separation or combination shall occur.

Section 654, R. S. Mo. 1929, provides that the population shall be based on the United States census of this state.

Title XIII, Section 202, of the United States Code of Laws provides that the period of three years, beginning the 1st day of January, 1930, and every tenth year thereafter, shall be known as the decennial census period, and such census shall be completed within that period.

Section 206 of the same title provides that the census shall be taken as of the 1st day of April.

Our Supreme Court discussed the effective date of the United States census in Kay v. Moniteau County, 134 S. W. (2d) 81. In that case the plaintiff contended that the census was not complete until 1936, while the facts showed that the county court of Moniteau County ascertained the census of that county at a much earlier date. In discussing the method of payment of plaintiff's salary, the court stated, l. c. 83:

> "'For the purpose of paying this salary, the population is to be "ascertained" by the county court itself, and two methods for its ascertainment of that fact are prescribed by the statute. The one is to multiply by five the whole number of votes cast in that county, at the last preceding presidential election; the other is by notice or knowledge on the part of the county court of the population of the county as ascertained by the decennial census. The statute by its terms made the first rule or method of ascertainment applicable, until the second became available.' (Italics Ours.) Since the county court paid plaintiff the salary authorized under the census method, it is immaterial to plaintiff as to how the court acquired knowledge of the census. The census method was available and the court was bound under the law to be guided thereby."

If, therefore, the forthcoming census has any effect on the offices above referred to, that change will not take place until the final results of the 1940 census become available to Adair County. However, we fail to find any specific statute contemplating the separation of the offices during the term of a circuit clerk, and must look to other sections pertaining to the office in an attempt to ascertain the intent of the legislature in such event.

Section 11535, Laws of Missouri, 1933, at page 361, provides:

> "On the first Tuesday after the first Monday in November, 1934, and every four years thereafter, an election shall be held for said office of recorder in each county of the state where the office of clerk of the circuit court and recorder of deeds are separate, * * * "

Section 11541, Laws of Missouri, 1933, page 362, provides:

> "At the general election to be held in the State of Missouri in 1934 and every four years thereafter, in all counties where the office of Circuit Clerk and Recorder are separate, a recorder of deeds shall be elected."

Section 11538, Laws of Missouri, 1933, at page 361, provides for an election in counties having a population of 20,000 or more for combining the offices of circuit clerk and recorder where such offices are separate. There is no provision for separating the offices in case they are combined.

A reference to Article I, chapter 74, R. S. Mo. 1929, discloses that, under the laws repealed by the 1933 legislature, formerly in counties containing

10,000 inhabitants, the county court was empowered to separate the offices of circuit clerk and recorder of deeds, and the governor was empowered to appoint a recorder when such separation was made. There is no provision in the new law for such appointment, and Section 10216, R. S. Mo. 1929, which is the general section under which the governor fills all vacancies, applies only to offices originally filled by election by the people.

A separation in the instant case would create and effect a new office, and there is no authority for filling such vacancy. If, on the other hand, it could be said that such office was filled by the election of the circuit clerk, then there is no vacancy since he was elected for a four year term.

A similar situation has arisen in this state with regard to the office of county treasurer. In 1933, the legislature abolished the separate office of county treasurer in certain counties and combined it with the office of county collector, effective January 1, 1936. The legislature of 1937 recreated the office of county treasurer by Section 12130, Laws of Missouri, 1937, page 425, which is as follows:

> "There is hereby created in the several counties of this State, now or hereafter having a population of less than 40,000 inhabitants according to the last Decennial United States Census, a county treasurer, to be appointed by the Governor, and to take office immediately after the effective date of this Act and who shall enter upon the discharge of the duties of his office after his said appointment and qualification and who shall hold his office for a term ending on the first day of January, 1939, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

We cite this section to call attention to the fact that certain authority was given to the governor to make appointments to fill the new offices created.

In view of this fact, and especially because of the two sections above cited providing for an election in 1934 and in each four year period thereafter, the next being 1942, it seems impossible to escape the conclusion that the legislature intended no change to be made separating the offices of circuit clerk and recorder except at such four year periods.

This is further supported by Section 11534, Laws of Missouri, 1933, at page 361, which is as follows:

> "That in the event any person has been elected or may hereafter be elected to the office of recorder of deeds in a county in which the office is a separate office at the time of such election, such office shall remain a separate office for the entire term for which such person has been or may be elected."

It is the conclusion of this department that an increase in the population of the county to 20,000 inhabitants or more, if shown by the 1940 census, will not create the separate office of recorder of deeds in such county in 1940, and that such separate office cannot come into existence prior to January 1, 1943, under existing laws.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

MUNICIPAL CORPORATIONS:
FEDERAL SURPLUS COMMODITIES CORPORATION:
APPROPRIATION OF PUBLIC MONEYS:

Municipal corporations of the second class may appropriate public moneys to be used by Surplus Commodities Corporation to carry out the purposes for which that corporation was formed.

August 15, 1940 8/17

FILED 5

Mr. E. A. Barbour, Jr.
Woodruff Building
Springfield, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not the City of Springfield, which is a municipal corporation of the second class, can provide, loan or give public funds to the Federal Surplus Commodities Corporation in order that the governmental plan of food stamps may be used in that city.

In connection with your request you state as follows:

> "Several weeks ago the City of Springfield and Greene County adopted what is commonly known as the Stamp Plan for the City of Springfield and the County of Greene. Pursuant to this plan, the City of Springfield and Greene County deposited with the Federal Surplus Commodities Corporation $10,000.00 each. The money that the City and County put up was to be used as a revolving fund, the contract being that upon notice of ten days the City and County, or either would have returned their $10,000.00
>
> "As you perhaps know, the Stamp Plan is briefly as follows: A person who is receiving aid from the Government pays a dollar and receives a green stamp which is good for one dollar in trade for any food commodity he desires

> to buy. At the time he receives his green stamp he is given what is called a fifty cent orange stamp; this orange stamp is good for fifty cents worth of commodities which have been designated as surplus commodities by the Federal Surplus Commodities Corporation, a corporation set up by the Department of Agriculture."

You also state in your letter that this money is used merely as a revolving fund and eventually it will be returned to the city. Regardless of whether or not the money is a revolving fund, this department is inclined to the view that the answer to your question would be the same in either case. Municipal corporations derive their powers and authority solely from the statutes and Constitution.

The provisions of the Constitution which would be pertinent to this question are as follows:

Article IV, Section 45, the part of which is pertinent here, reads as follows:

> "The General Assembly shall have no power to give or to lend, or to authorize the giving or lending of the credit of the State in aid of or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever: * * * * "

Article IV, Section 47, the part of which is pertinent here, reads as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political

> corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: * * * * * * * * * * * * * * "

Article IX, Section 6, the part of which is pertinent here, reads as follows:

> "No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others. * * * * * * * * * * * * * * * "

If the City of Springfield is authorized to appropriate this money for the aforesaid purposes, it is by virtue of the provisions of Section 6486, R. S. Missouri 1929, subsection XXVIII, as amended in Laws of Missouri, 1933, page 315, as follows:

> "To provide for the support, maintenance and care of insane and sick poor persons, paupers, and the indigent and helpless of the city."

Also, subsection LXXII of the same section found at page 322, Laws of Missouri, 1933, in so far as it is pertinent to this question, provides as follows:

> "* * * In addition to the powers specially enumerated and conferred in the foregoing provisions of this

> section, the council shall have further power to pass, amend and repeal all ordinances, all rules and police regulations, not inconsistent with the Constitution and laws of the United States and the Constitution of this state, and necessary for the good government, peace, order, health and welfare of the city and trade and commerce thereof, or that may be necessary and proper for carrying into effect the provisions of this article * * "

From your correspondence, it seems that some may take the view that to make this appropriation for the aforesaid purposes would be in violation of the criminal statutes. Under Title 7, Section 612c, U. S. C. A., Congress made an appropriation to carry out the provisions of the Agricultural Adjustment Act. This section stated one of the purposes of the act was:

> "* * * * * * * * * * * * * * * * * * *
> (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; * * * * * * * * * "

The Federal Surplus Commodities Corporation was set up by the Department of Agriculture to carry out the plan provided for under the aforesaid Agricultural Adjustment Act. This plan is set out in Title 15, Section 713c, U. S. C. A. This section provides as follows:

> "In carrying out the provisions of clause (2) of section 612c of Title

7, as amended, the Secretary of Agriculture may transfer to the Federal Surplus Commodities Corporation, which Corporation is hereby continued, until June 30, 1942, as an agency of the United States under the direction of the Secretary of Agriculture, such funds, appropriated by said section 612c, as may be necessary for the purpose of effectuating said clause (2) of section 612c: Provided, That such transferred funds, together with other funds of the Corporation, may be used for purchasing, exchanging, processing, distributing, disposing, transporting, storing, and handling of agricultural commodities and products thereof and inspection costs, commissions, and other incidental costs and expenses, without regard to the provisions of existing law governing the expenditure of public funds and for administrative expenses, including rent, printing and binding, and the employment of persons and means, in the District of Columbia and elsewhere, such employment of persons to be in accordance with the provisions of law applicable to the employment of persons by the Agricultural Adjustment Administration.

"In carrying out clause (2) of section 612c, the funds appropriated by said section may be used for the purchase, without regard to the provisions of existing law governing the expenditure of public funds, of agricultural commodities and products thereof, and such commodities, as well as agricultural commodities and products thereof purchased under the preceding paragraph hereof, may be donated for relief purposes."

It will be noted that the purposes of the aforesaid acts were to consume the surplus farm products and to distribute them to the poor people who were recipients of federal or state funds under the relief program.

The authority to appropriate public funds for public purposes under the aforesaid provisions of the Missouri Constitution has been under consideration by the courts in this state on a number of occasions. In the case of Jasper County Farm Bureau v. Jasper County, 286 S. W. 381, the Supreme Court, in Division Two, in an opinion by Judge Otto, held that public funds could be appropriated to carry out the provisions of the Farm Bureau Act and that it was not in conflict with the aforesaid provisions of the Constitution to appropriate funds for that purpose. In connection with this case the court, at l. c. 383, said:

> "It is also true that many objects for which money may be appropriated are so clearly public in their nature that there could not well be any difference of opinion on the subject, such, for example, as public charities, and appropriations provided for the care of the indigent, destitute, and insane, either in institutions exclusively under state control or those maintained by corporations for purely charitable purposes. In 1894 this court, in banc, in the case of State ex rel. City of St. Louis v. Seibert, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624, held that an appropriation for the support of the indigent insane in the asylum of the city of St. Louis who belonged to the state outside of the city was not unconstitutional even though such insane asylum was a private institution of such city and was not one of the state eleemosynary

institutions. So also public funds appropriated for the state and county system of schools. Likewise the expending of public funds in the construction of necessary public buildings and the construction and maintenance of public roads. On the other hand, there are many other enterprises helpful to the public in the community in which they are located, and that contribute very largely to the development and progress of the state, that are so purely private in their nature as not to admit of any doubt about the matter. Such, for example, are manufacturing or commercial enterprises established and maintained by private individuals or corporations for purely private gain.

"There are also many purposes for which public money may be appropriated from the use of which some persons derive more benefit than others, but this circumstance does not detract from the fact that their chief function is to administer to the public good, although the enjoyment and advantages derived from their maintenance are not distributed equally, even between members of the public who are situated alike or in the same class. If it were essential to the establishment or existence of an enterprise to be set up and sustained by public aid that all members of the public or all members of any class should derive from it the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart."

This court, at the same page, also said:

> "* * * * There is, of course, no difficulty in ruling that public funds cannot be appropriated for other than public purposes. About this there can be no dispute, and therefore, when a controversy such as comes up in this case arises, the only question to be considered is whether the purpose for which the money is to be appropriated is a public one within the meaning of the constitutional provisions."

So under this ruling if the funds appropriated by the City of Springfield are for a public purpose, then the appropriation is not in conflict with the provisions of the Constitution.

In the case of Jennings v. City of St. Louis et al., 58 S. W. (2d) 979, the Supreme Court en Banc held that an ordinance authorizing issuance of bonds to provide relief for people of the city who were unable to take care of themselves and to relieve them of their condition was an appropriation for a public purpose and within the provisions of the Constitution. In this case, at l. c. 980, the court said:

> "While no hard and fast rule can be laid down as to whether or not an enactment of the Legislature is for a 'public purpose,' yet this court, in the case of State ex rel. v. Switzler, 143 Mo. 287, loc. cit. 317, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653, approved the test laid down by the Supreme Court of the United States, in the case of Citizens' Sav. & Loan Association v. Topeka, 20 Wall. 655, 665, 22 L. Ed. 455, wherein the court said: 'In deciding whether, in the given case, the object for which

the taxes are assessed falls upon the one side or the other of this line, they (the courts) must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.'

"An examination of the Revised Statutes of Missouri 1929 clearly shows that poor relief is a 'public purpose' and a governmental duty because by sections 12950 and 12952 (Mo. St. Ann. Sections 12950, 12952), counties are authorized to spend money in support of the poor; by section 9986 (Mo. St. Ann. Section 9986) a county pauper fund is provided; by section 12058 and 13942 (Mo. St. Ann. Sections 12058, 13942) county poor houses and county hospitals are maintained; section 9697 (Mo. St. Ann. Section 9697) gives authority to educate poor children that are blind or deaf; section 12961 (Mo. St. Ann. Section 12961) directs the county court to set aside, out of its annual revenues, a definite sum for the support of the poor; article 1, chapter 90 creates a state board of charities and defines its functions; section 12930 (Mo. St. Ann. Section 12930) requires this board to supervise public relief to the poor; sec-

> tion 12938 (Mo. St. Ann. Section 12938) authorizes cities to provide for a social welfare board; section 7330 (Mo. St. Ann. Section 7330) gives cities under special charter, authority to maintain poor houses and charitable institutions. Also, various sections of these statutes give cities of the first, second, third, and fourth class power to provide funds to care for the poor. Section 1, article 1, paragraph 31, of the Charter of the City of St. Louis is as follows: 'To provide for the support, maintenance, and care of children and sick, aged, or insane poor persons and paupers.' Pargraph 32 authorizes the city: 'To provide and maintain charitable, educational, recreative, curative, corrective, detentive, or penal institutions, departments, functions, facilities, instrumentalities, conveniences, and services.'"

This same case cites a case passed on by the Supreme Court of Pennsylvania in Commonwealth v. Liveright, 308 Pa. 35, 161 A. 697, loc. cit. 710, wherein the court quoted the Pennsylvania Court as follows:

> "'We again hold that the support of the poor--meaning such persons as have been understood as coming within that class ever since the organization of the government, persons who are without means of support, the same persons stated in the * * * Bill * * *--is and has always been a direct charge on the body politic for its own preservation and protection; and that as such, in the light of an expense, stands exactly in the same position as the preservation of law and order. The expendi-

> ture of money by the state for such purposes is in performance of a governmental function or duty, and is not controlled by the constitutional provision, if the purpose is to supply food and shelter to the poor, including those who are destitute because of enforced unemployment, provided only that the money be not administered through forbidden channels. * * * * * * * * * * * * * * * * * To hold that the state may not under the Constitution now aid such people, even though it be a governmental duty, would be to deny to the state the right to perform, not only an important, but at this time a most pressing, governmental function. To hold that the state cannot or must not aid its poor would strip the state of a means of self-preservation, and might conceive untold hardships and difficulties for the future.'"

Under the foregoing authorities we do not think there is any question but that an appropriation of the city funds for the purpose of aiding the Federal Surplus Commodities Corporation to carry out the provisions of the Agricultural Adjustment Act by using surplus commodities and selling them to the people who are on relief at a reduced price would not be in violation of the foregoing constitutional provisions.

It seems from your letter that the question has been raised whether or not the city would be authorized to appropriate this money to the Federal Surplus Commodities Corporation as its agent for the relief of its citizens. We think the case of State ex rel. v. Seibert, 123 Mo. at 424, settles this question. In that case the Supreme Court en Banc held:

> "An appropriation for the support of the indigent insane in the insane asylum of the city of St. Louis who belong to the state outside of the

> city, is not unconstitutional, though such insane asylum is a private institution of such city, and is not one of the state eleemosynary institutions."

This case, at l. c. 432, cited a Maryland case as authority for its views in which it said:

> "It was held by the court of appeals of Maryland that the city of Baltimore could, by contract with private institutions, provide for the support of the foundlings, insane and other charitable objects of the city and appropriate the public money for that purpose. The court in that case says: 'If the city has not provided for such persons, or if they can be better taken care of and trained in those, or such institutions, than in the institutions of the city, we can perceive no good reason why the city may not contract for such care and training.' St. Mary's Industrial School v. Brown, 45 Md. 335."

CONCLUSION

From the foregoing it is the opinion of this department that a city of the second class may appropriate public funds for the purpose of creating a revolving fund to be used by the Federal Surplus Commodities Corporation in such city to carry out the provisions of the federal and state relief programs.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

MUNICIPALITIES: Motor Vehicle Fuel Tax Reports of Kansas City, Missouri, may be inspected, when.

July 5, 1940

7-9

FILED

Mr. H. M. Bergin
Auditor
Motor Fuel License Tax
City Hall
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of June 7, 1940, asking our opinion on the following question: Are the records of the License Collector of Kansas City, Missouri, concerning the Motor Fuel Tax reports open to public inspection?

Section 7582 R. S. Mo. 1929, provides as follows:

> "The license collector shall keep a separate record or book for each kind of license or tax receipt which he is authorized to issue, in each of which shall be recorded the names of all applicants for such licenses, the place at which the applicant is permitted to conduct the business authorized, if the license is for such purpose, otherwise the place of business or residence of the applicant, and the date of issuance of the license, all of which shall be public and open to the inspection of any citizen; he shall also keep all statements and affidavits furnished him in his office for public reference and the convenience of the officers of such city."

It will be noted that this section requires a record to be kept of each license or tax receipt which the license collector issues, and states the information

concerning said license required to be kept by the license collector. The said section provides: "all of which shall be public and open to the inspection of any citizen". It is clear that this section does not authorize the public to inspect the Motor Vehicle Fuel Tax reports made by licensee to Kansas City, Missouri, since the tax report is not a license or tax receipt. However, we feel that said records are public records which are subject to inspection in some instances without a statutory grant of authority to make that inspection.

In 23 R.C.L., page 155, it is said:

> "A public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, * * *."

We assume that the Motor Vehicle Fuel Tax reports concerned are public records within this definition.

In 23 R.C.L., page 160, it is said:

> "It is quite generally conceded that there is no common law right in all persons to inspect public documents or records; and that right, if it exists, depends entirely on the statutory grant. But at common law, every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information."

Therefore, it is our opinion that the Motor Vehicle Fuel Tax reports made to the License Collector of Kansas City, Missouri, if public records, are subject to inspection by anyone who has an interest therein which is such as would enable him to maintain or defend an action for which

the document or record sought can furnish evidence or necessary information.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

HIGHWAYS: Township Board has exclusive right to purchase material and make all necessary contracts in the expenditure of bond money in the construction and reconstruction of roads under Section 7946, R. S. Mo. 1929. Section 7963, R. S. Mo. 1929, also discussed. All expenditures over the sum of $500.00 must be by public letting.

June 13, 1940

6/14

FILED

Honorable James B. Bittiker
Clerk of the County Court
Carroll County
Carrollton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated June 4, 1940, which reads as follows:

> "I am directed by the County Court to submit the following for an opinion.
>
> A Township has voted road bonds under Section 7961, R. S. Mo. 1929, for the purpose of improving roads in the Township. The bonds have been sold, as provided by Section 7963, R. S. Mo. 1929. The Township Board proposes to purchase the necessary materials and the question has arisen whether or not the provisions of Section 7946, R. S. Mo. 1929, give the Township Board the exclusive right to purchase the materials or whether, under Section 7963, the County Court must assist in the purchase of such materials.
>
> It is further requested that we be advised as to whether or not, under Section 7946, the Township Board, if it has the right to do its own buying must advertise for bids before purchasing the materials or whether it may make such purchase, as it deems advisable."

From your statement, we formulate the two following questions: First, does a township board have the right to purchase materials for the construction of roads?

Second, is it imperative that the township board advertise for bids before purchasing materials -- if so, when?

For the purpose of this opinion, we quote verbatim Sections 7946, 7963 and 7947, R. S. Mo. 1929, and hereafter refer to them by numbers:

> "Sec. 7946. Who may contract. Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. The county court, the township board or road district commissioners may accept donations of labor or materials from interested parties either on road improvements or bridge constructions and said authority may employ labor or contractors to complete said improvements. Before beginning the construction or improvement of any road, bridge or culvert by day labor or by contract, the plans, specifications, estimates of drainage, maps, profiles, estimates of cost and the specific location of such road, bridge or culvert shall be filed in the office of the county clerk, township clerk, or commissioner of road district, as the case may be, and before becoming effective shall be approved by

said county, township or road district authorities. On completion of the work a detailed statement of the cost shall be filed as in the next succeeding section provided, and shall be recorded in the book wherein are recorded contractors' bids; when any pay rolls or construction accounts are certified to as correct by the engineer in charge of the work, the bills for the same shall be passed upon by the county court, township board or district commissioner, and if found correct, shall be paid: Provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

"Sec. 7963. Bonds to be sold, when -- how. The board of commissioners on behalf of the special road districts, and the county court on behalf of the townships, shall sell said bonds to the best advantage and the proceeds shall be paid over to the treasurer of the district or the county or township, as the case may be, and be by him disbursed, on the order of the board of commissioners or county court, in payment of the cost of holding said election and in paying the cost of constructing or improving roads in such districts or townships, including bridges and culverts."

"Sec. 7947. Specifications, plans, etc., to be filed -- when -- where. -- Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be con-

structed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of $500, the county, township or district authorities shall order the county highway engineer, or other engineer in their employ, or both such engineers acting together, if so desired, to prepare and file with the clerk of the court, township board or district commissioners, as the case may be, all necessary maps, plans, specifications and profiles, and an estimate of the cost of the work. The court or other proper authority may approve or reject the maps, plans, specifications and profiles and order others prepared and filed. When the maps, plans, specifications and profiles have been approved, the county, township or district authorities shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed, which said advertisement shall be published once a week for three consecutive weeks, the last insertion to be within ten days of the day of the letting. All bids shall be in writing, accompanied by instructions to bidders which shall be furnished by the engineer upon application. All bids on road work shall state the unit prices upon which the same are based. All bids shall be sealed and filed with the clerk of the county court, township board or special road district commissioners, and, on the day and at the hour named in the advertisement, shall be publicly opened and read in the presence of the court, township board or special road district commissioners, and the engineer, and shall then be recorded in detail in some suitable book. All bids shall be accompanied by a certified check

equal to ten per cent. of the engineer's estimate of cost, payable to the county treasurer, to the use of the county, township or road district, as the case may be, or a bidder's bond executed by some surety company authorized to do business in this state or other good and sufficient surety in a like sum shall be given, as a guarantee on the part of the bidder that if his bid be accepted he will, within ten days after receipt of notice of such acceptance, enter into contract and bond to do the work advertised, and in case of default forfeit and pay sum of ten per cent. of the engineer's estimate of cost. The contract shall be awarded to the lowest responsible bidder. The court may in its discretion reject any or all bids. Any bid in excess of the engineer's estimate of the cost of the work to be done shall be rejected. When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be. The contract shall have attached to and made a part thereof the proposal sheet instructions to bidders, the bid, maps, plans, specifications and profiles. Whenever the contract is executed and approved by order of record and indorsement thereon, it shall be filed and preserved as a permanent record. It shall be incorporated in the contract that the county, township or special road district shall reserve the right to make any additions to, omissions from, changes in or substitutions for the work or materials called for by the drawings and specifications, without notice to the surety on the bond given to secure the faithful performance of the terms of the contract. The bidder must agree that before the county or political subdivision shall be liable for any additional work or material, the county or political subdivision must first order the same, and the cost thereof must be agreed upon in

> writing and entered of record before such additional work shall apply in case of omissions, deductions, or changes and the unit prices shall be the basis of the values of such changes. In case of disagreement upon the cost or price of any addition, omission or change ordered or so desired, then it is expressly agreed that the decision of the state highway engineer shall be received and accepted as fixing definitely and finally the cost of such change, and when so fixed, the court, township board or special road district commissioners shall enter of record such change. It shall also be provided in the contract that the contractor will furnish and promptly pay for all labor employed and materials used in the performance of such contract."

In turning to Laws of Missouri, 1917, at page 461, Article IV, we find the title "Miscellaneous Provisions". On page 467, under the general title "Road Contracts", we find Section 79 which is now Section 7946, supra. Under the same title, we find Section 80, which is now Section 7947, supra. On page 472, we find the general title "Township and Special District Road Bonds". Under this general title, we find that Section 91 is now Section 7963, supra.

In the case of State ex rel. Wammack & Welborn v. Affolder, 257 S. W. 493, l. c. 494, the court had this to say in construing Section 10750, R. S. Mo. 1929:

> "Does section 13204, R. S. 1919, prohibit defendant from paying the warrant? This section reads:
>
> 'The township trustee and ex officio treasurer shall not pay out any moneys belonging to the township for any purpose whatever, except upon the order

> of the township board. * * * and attested by the township clerk.'
>
> This section was enacted in 1879 (Laws 1879, p. 225), when the Township Organization Act was passed, and has come down without substantial change. Section 10750, R. S. 1919, was passed in 1917 (Laws 1917, p. 473), and provides among other things as stated, supra, that the proceeds of the bonds shall be paid over to the township treasurer and by him disbursed on the order of the county court, etc. In State ex inf. Major v. Amick, 247 Mo. loc. cit. 292, 152 S. W. loc. cit. 597, the court said:
>
> 'Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act.'
>
> This rule of construction has been invoked many times, and is applicable here. Since section 10750 is a much later statute than is section 13204, and since section 10750 applies to a particular subject, and since section 13204 is general in its application, we hold that section 10750, on the point in question, should be construed as an exception to the general and prior section 13204."

Therefore, upon the reasoning of this case, and in viewing the titles under which these sections fall, we find that the legislature set up in Sections 7946

and 7947, R. S. Mo. 1929, a plan for the expenditure of "any public moneys, whether arising from taxation or from bonds heretofore or hereafter issued to be expended in the construction, reconstruction, or other improvement of any road, bridge or culvert. The county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct * * * "

It is our opinion that Section 7946, supra, gives the township board the right to expend the money and to purchase materials and to make all necessary contracts in the carrying out of expenditures of any moneys derived arising from the source set forth in this section.

We are further of the opinion that Section 7963, supra, does not take this right away from the township board and place it in the hands of the county court for the reason that it will be noted that Section 7963 carries the title "Bonds to be sold, when -- how.", and is under the general title "Township and special district road bonds", which is a different and distinct title from the one under which Sections 7946 and 7947, supra, fall.

In reading the case of State ex rel. Wammack & Welborn v. Affolder, supra, it will be noted that the court held that Section 7963 was an exception to Section 13204, R. S. Mo. 1919. However, we are mindful of the fact that the reasoning used in determining that case could not be used in the instant case because the sections above referred to were passed in the same act. (See Laws of Missouri, 1917.) It will be noted in this case that the court had in mind the act of 1917, and on page 495, had this to say:

> "By the act of 1917, Duck Creek township was granted the power to vote the bonds mentioned in this record. The county court in that instance, by direction of the statute, acted for the township instead of the township board, which usually acts for it."

We are of the opinion that Section 7963, R. S. Mo. 1929, is an exception in that it gives the township board the right to allow the county court to expend the money if it so chooses. However, if it does not choose to do so, the township board, under Section 7946, R. S. Mo. 1929, has the right to expend the money so long as it expends it in accordance with Section 7947, R. S. Mo. 1929.

In conclusion, it is our opinion that the township board does have the right to purchase all materials and make all necessary contracts in the expenditure of moneys derived from the bond fund referred to in your letter.

In regard to your second question, is it imperative that the township board advertise for bids before purchasing materials -- if so, when?

Upon close reading of Section 7947, supra, it will be found that it reads, "Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be constructed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of $500, the county, township or district authorities shall order the county highway engineer * * * to prepare and file * * * all necessary maps, plans, specifications and profiles." When these "have been approved, the county, township or district authorities, shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed * * * The contract shall be awarded to the lowest responsible bidder. * * * When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be."

It will be noted that this section uses the verb "shall", and it has been held that when the word is used in the statutes, it is usually construed by our courts as mandatory, and must, therefore, be complied with accordingly.

In answer to your second question, we are of the opinion that Section 7947, supra, makes it mandatory upon the township board to advertise and let for public bidding all contracts where the engineer's estimated cost exceeds the sum of five hundred dollars.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:VC

TAXATION AND REVENUE:
LEVY OF TAXES:

The levy for current county expenses and for the purpose of paying outstanding obligations may not be made by the county court in excess of the constitutional limit.

March 6, 1940

3-11
FILED
9

Honorable Charles T. Bloodworth, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department based on the following statement of facts:

> "The County Court of this county has levied the full rate of fifty-cents on the one hundred dollar valuation as permitted in Section 9873, Missouri Statutes. There are several thousand dollars in debts and obligations, which the county owes and became obligated for in years prior to this year. In these debts and obligations is a judgment against the county in the sum of $2800.00, which judgment remains due and unpaid and is in favor of the eleemosynary institutions of the state.
>
> "The County Court has now, under Section 9868 of Missouri Statutes, made a court order directing and requesting the Prosecuting Attorney of this county to prepare a petition directed to the Circuit Judge, praying that an additional levy of twenty-cents on the one hundred dollar valuation be made to take care of this judgment and several thousand dollars in past due obligations.
>
> "The County Court has requested me to seek an opinion for them from you as to whether or not they can exceed

> this maximum levy of fifty-cents on the one hundred dollar valuation for the purposes set forth hereinabove and in the manner described hereinabove. I refer you to the case of State ex rel. vs. Railroad, 247 S. W. 182."

You state in your letter that the county court has fixed the rate of the levy for county purposes at fifty cents on the one hundred dollars valuation. This rate of levy is authorized by virtue of the provisions of Section 9867, R. S. Missouri 1929.

Since the amount of money raised under the foregoing levy is only sufficient to pay the current indebtedness, then you ask whether or not an additional levy may be made by virtue of the provisions of Section 9868, R. S. Missouri 1929. The provisions of this section, which are pertinent to your question, are as follows:

> "No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.,: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for

> such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

It will be noted that the levy authorized by said Section 9868 must not be in conflict with the Constitution and laws of this state.

The provisions of the Constitution, which relate particularly to the rate of levy that may be made for county purposes, will be found in Section 11 of Article X, Constitution of Missouri which provides in part as follows:

> "Taxes for county, city, town and school purposes may be levied on all

> subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. * * * "

We do not have before us the valuation of your county, but it will be noted under the foregoing provisions of the Constitution that no county is authorized to make a levy for county purposes which exceeds fifty cents on the one hundred dollars valuation. Since your county court has reached this maximum, then any levy in excess of fifty cents on the one hundred dollars valuation, which would be directed by said Section 9868, apparently would be in conflict with said Section 11 of Article X of the Constitution.

In speaking of the constitutional limitations of the levy authorized by said Section 9868, the Supreme Court, in State ex rel. v. Wabash Ry. Co., 169 Mo. 563, 70 S. W. 132, said:

> "'A proceeding in conformity with section 7654, Revised Statutes 1889 (now 12860, R. S. 1919), is the proper course to pursue in order to require a county court to make a

special levy for the purpose of paying outstanding and unpaid warrants, but a proceeding under that section does not make valid a levy in excess of the constitutional limit. What is meant by that section is that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness.'"

It will be noted that the court in plain language here stated that the levy authorized by said Section 9868 to pay past indebtedness together with the levy authorized by said Section 9867 must not exceed the constitutional limit authorized by said Section 11 of Article X of the Constitution of Missouri.

CONCLUSION.

From the foregoing it is the opinion of this department that the county court, even though requested and directed to make a levy in accordance with the provisions of Section 9868, R. S. Missouri 1929, would not be authorized to fix the levy at an amount in excess of fifty cents on the one hundred dollars valuation which must include the levy provided by said Section 9867. Therefore, since your county court has already made the levy under Section 9867, R. S. Missouri 1929, of the maximum amount authorized by the Constitution, then any levy authorized under said Section 9868 in excess of that amount would be in violation of the aforesaid provisions of the Constitution and void.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

SHERIFFS: Payment of salary to jailer or to sheriff out of county fund is not authorized.

June 6, 1940

6-10

FILED

9

Hon. Charles T. Bloodworth, Jr.
Prosecuting Attorney, Butler County
Poplar Bluff, Missouri

Dear Sir:

Receipt is hereby acknowledged of your letter of May 29, 1940, requesting an opinion, as follows:

> "Recent auditors reports concerning offices of Butler County officials revealed that the Sheriff of this county had been receiving thirty dollars per month as part compensation for employment of a jailer to look after the Butler County jail.
>
> "The County Court paid this money to the Sheriff to employ a jailer to look after the condition of the jail and to be on hand at times when the Sheriff or his deputies could not be in their offices and to look after the condition of sanitation of the jail. Prior sheriffs of this county had been allowed fifty dollars a month for compensation of this nature.
>
> "The recent auditors report makes the contention that the Sheriff owes this money back to the court. I presume that they state this contending that there is no statute permitting the County Court to pay the Sheriff compensation for jailers hire. Before bringing suit or before attempting to collect this money, I would like to know whether

> or not it is your opinion that the County Court cannot compensate the Sheriff for the hiring of a jailer. It seems to me that under the general law pertaining to County Courts, giving them the power to take care of county property, that they would have a right to employ a man of this capacity or compensate the Sheriff for such employment of a jailer.
>
> "Will you please advise me at your earliest possible convenience whether or not the County Court could employ a jailer to look after the county jail?"

The general law covering jails and jailers is found in Article 9, Chapter 44, Revised Statutes of Missouri, 1929.

Section 8526, R. S. Mo. 1929, which authorizes the sheriff to appoint a jailer, is as follows:

> "The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

There are numerous other sections pertaining to the duties of sheriff or jailer, and Section 8549, R. S. Mo. 1929, expressly provides for the removal of sheriff or jailer for failure to perform certain duties. This section is as follows:

> "The said sheriff or keeper of the jail may also, in the discretion of the said court, be removed from office, and rendered incapable of holding or executing the same thereafter."

There is no section of the statute specifically providing for any compensation for a jailer except the fees mentioned in this Article and Chapter, supra, for the performance of the duties by the sheriff or jailer in connection with the management and control of the jail and prisoners and boarding of the prisoners.

Section 8541, R. S. Mo. 1929, provides for the appointment of a deputy jailer under certain circumstances and for paying to such deputy jailer compensation not to exceed one hundred and fifty dollars per annum out of county funds.

A search of the entire Article fails to reveal any provision made for paying to the jailer a fixed salary out of county funds, and, in order for any such payment to be made there must be statutory authorization, as stated in State ex rel. Linn County v. Adams, 172 Mo. 1, l. c. 7:

> "* * * For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. (Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Wallbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Gammon v. Lafayette Co., 76 Mo. 675.)"

The Legislature, having failed to provide any salary for a jailer, and, having made, in the same Article, provision for payment of a salary to deputy jailers in certain circumstances, would indicate that its intention was that the jailer, appointed by virtue of the authority of Section 8526, should receive his compensation in the way of fees provided for taking care of prisoners, committing prisoners, etc.

In the case of Moutier v. Stumpe, 39 Mo. App. 161, a case involving the fees due for boarding prisoners, the St. Louis Court of Appeals, l. c. 164, said:

> "The idea that the jailor of a county is only the servant or employe of the sheriff cannot be harmonized with the foregoing provisions of the statute. It is true that the jailor owes his position to the sheriff, and it is equally true that he holds it during the pleasure of his superior, but this does not necessarily make him a servant or employe. That the keeper of a county jail holds an independent official position, is to be gathered from the entire statute on the subject, and it is rendered incontrovertible by section 6094, which expressly provides, that the keeper of the jail may, by an order of court, be removed from office, and rendered incapable of holding or executing the same thereafter. The sheriff himself may act as jailor, but, when he appoints some one else to the position, he thereby creates an independent official, upon whom the statute imposes certain official duties. It follows from this that the plaintiff's compensation for boarding the prisoners did not depend upon any private contract with Ehlers, but was fixed and regulated by section 6078, supra, which provides, that, if the jailor of a county shall furnish any prisoner with board, he shall be allowed therefor such compensation as shall be fixed by law."

Section 6094 mentioned in the above quotation is now Section 8549, Revised Statutes of Missouri, 1929.

CONCLUSION.

In view of the fact that the Legislature made no provision for paying a salary to a jailer out of county funds, that there are certain fees to be paid to the sheriff or jailer in connection with the performance of duties in connection with the jail and board and management of the prisoners, and the decision above quoted from, it is the

opinion of this department that the payment of a salary out of county funds to a jailer in your county is an unauthorized expenditure.

Also, enclosed herewith is copy of an opinion, dated September 10, 1937, written by S. V. Medling, Assistant Attorney-General, upon the subject of payment of salary to deputy sheriffs out of county funds.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

WOJ:CP

STATE PARK BOARD:
UNEMPLOYMENT COMPENSATION:
CONCESSION OPERATORS IN THE PARK:

The fact that employers operate concessions in state parks does not release them for liability for unemployment compensation tax.

January 23, 1940 1-23

FILED 10

Honorable I. T. Bode, Director
State Park Board
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following statement:

> "We have inquiries from our concession operators in parks regarding the payment of unemployment compensation, both Federal and State. This inquiry applies to concession employees as distinguished from persons on State payroll.
>
> "It will be recalled that the concessions are handled on a percentage basis, a percentage of the gross collections to be returned to the State as lease or rent on the concession property. In many instances the park superintendent also acts as concessionaire. In some other instances the concession operator is not the park superintendent."

Under the Missouri Unemployment Compensation Act, Laws of Missouri 1937, page 576, the term "employer" is defined as follows:

> "(1) Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in

> employment, eight or more individuals irrespective of whether the same individuals are or were employed in each such day; "

The word "employer" means that part as shown in number (1).

It is because of the fact that the concession is operated on state property that the operator might think he is exempt from the provisions of the Unemployment Compensation Act. In our research on this question, we think it has been answered by the United States Supreme Court in the case of Buckstaff Bath House Co. vs. McKinley et al. This opinion was rendered in October, 1939, and has not yet been reported but is listed in the Advanced Sheets of the United States Supreme Court Reporter as number 201. In that case the plaintiff operated a bathhouse on government property under a lease from the Secretary of the Interior. By the terms of this lease, the plaintiff was subject to certain control of the Department of Interior, which in the main related to the number of bath tubs it was to use, the charge to the public, the qualifications of employees, the maintenance and care of the premises, a prohibition of employment of agents to solicit patronage, and control over an assignment or transfer of the lease or any interest therein. In that case the court held that the plaintiff was liable for the payment of the Social Security Tax of the State of Arkansas. Concerning the plaintiff's liability the court said:

> "There can be no question but that petitioner is liable for the tax levied by Section 901 of the Social Security Act, unless it is exempted by that portion of Section 907 which relieves 'an instrumentality of the United States' from that duty. But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the

> United States does not make it an instrumentality of the latter. Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner 'is engaged in its own behalf, not the government's, in the conduct of a private business for profit'. See Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 23. Though it acts with the Government's permission and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter. See Broad River Power Co. v. Query, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See Federal Compress & Warehouse Co. v. McLean, supra. That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See James v. Dravo Contracting Co., 302 U. S. 134, 149. * * * * * * * * * "

We think the question which you have presented is analogous to the question which is before the Supreme Court in the Buckstaff Bath House Company case, and we think the question is answered by that case which holds that the employer is liable for the tax.

CONCLUSION.

From the foregoing it is the opinion of this department that private parties who operate concessions in state

parks, if they employ the number of employees to bring them within the provisions of the Missouri Unemployment Compensation Act, that they are liable for the payment of the Unemployment Compensation Tax and subject to the provisions of said act.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

LIQUOR: Failure to keep an orderly house has not been made a punishable crime by Section 13139-z-24 of the Non-intoxicating Beer Laws.

February 15, 1940

2-16

FILED
10

Honorable Fred C. Bollow
Prosecuting Attorney
Shelbina, Missouri

Dear Sir:

We have received your letter of February 10th, which reads in part as follows:

> "I should appreciate an opinion from your department as to whether or not a criminal prosecution will lie for a violation of the provisions of Sec. 13139-z-24 of the Non-intoxicating beer laws of the State of Missouri."

From another communication from you, we learn that the exact question you have in mind is whether or not, under the laws governing the sale of 3.2% or non-intoxicating beer, a dealer can be convicted of the offense of not keeping at all times "an orderly place or house." In other words, under the non-intoxicating beer act, is it a crime to keep a disorderly house?

In the 3.2% beer laws, the only mention of either an orderly or disorderly house is contained in Section 13139-z-24, Laws of Missouri 1935, page 402. This section reads as follows:

> "Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the pro-

> visions of this act, said Supervisor of Liquor Control shall revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to revoke his license prior to the order of revocation issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing of the grounds upon which his license is sought to be revoked."

The legislature did not define what it meant by a disorderly house or what it meant by the failure of a dealer to keep an orderly place or house. No one can read the above statute and determine with any certainty whether or not he has violated the law or what act or acts constitute a violation of said section in order to subject him to a criminal prosecution.

The Supreme Court of Missouri en b anc in the recent case of Diemer vs. Weiss 122 S. W. (2nd) 922, had a similar situation before it. This case was an action in habeas corpus. The petitioner was deprived of his liberty by the city marshal of Kirkwood, who had custody of him under a commitment by the city court of said city. He was convicted in said court under a section of an ordinance entitled "offense against public order and peace". The ordinance and the reasoning of the court are as follows:

> "The first paragraph of Sec. 490a follows:
>
> 'Sec. 490a. Picketing - prohibited when - penalty. It shall be unlawful within the City of Kirkwood, Missouri, for any person, persons or members of any voluntary organizations, or agents of any corporation, to interfere with the operation of any established business or businesses or with any working agreement established between

any employer and employee engaged in any business within the City of Kirkwood, whether said employer operates as a firm, association, individual, corporation or co-partnership, by what is commonly known as picketing such employer or his place of business, or by any unlawful method intended to disrupt or affect the existing established relations between such employers and employees, or to harass, coerce or damage such employer or his or its business; provided, however, that this Ordinance and Section shall not apply in the event of an existing strike engaged in by all or part of the employees of any such business.'

The said paragraph may be divided as follows:

(1) 'It shall be unlawful * * * for any person * * * to interfere with the operation of any established business * * * or with any working agreement established between any employer and employee engaged in any business * * * by what is commonly known as picketing such employer or his place of business.'

(2) 'It shall be unlawful for any person * * * to interfere with the operation of any established business or with any working agreement established between any employer and employee engaged in any business by any unlawful method intended to disrupt or affect the existing established relations between such employers and employees."

(3) 'It shall be unlawful for any person * * * to harass, coerce or damage such employer or his or its business.'

* *

Petitioner contends that the ordinance is vague, indefinite and uncertain, and for

that reason invalid. The rule is stated as follows:

'When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void; for if no judicial certainty can be settled upon as to its meaning, courts are not at liberty to supply the deficiency or make the statute certain. But legislation cannot be nullified on the ground of uncertainty, if susceptible of any reasonable construction that will support it.' 26 Am. and Eng. Ency. Law, 2d Ed., 656.

'Where the statutory terms are of such uncertain meaning, or so confused, that the courts cannot discern with reasonable certainty what is intended, they will pronounce the enactment void.' Statutory Crimes, 3d Ed., in the third subdivision of section 41.

'Statutes and ordinances which fix crimes, or quasi crimes, should so fix them that there could be no uncertainty. They should be so worded that one could read them, and know whether or not he was violating law. They should not be so worded as to leave their substantive elements to the caprices of either judge or jury. In other words the law should be complete and definite. What would be "reasonable effort" under this law is left a question for the court or jury. What in the minds of one court or jury might be "reasonable effort" might not be so considered by another court or jury. Each trial tribunal would be making its own ordinance. This willnot do for a law or ordinance criminal

in character.' Taft v. Shaw, 284 Mo. 531, loc. cit. 544, 545, 225 S. W. 457, loc. cit. 461.

'A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations, will not render it nugatory. Doubts as to its construction will not justify us in disregarding it. It is the bounden duty of the courts to endeavor, by every rule of construction, to ascertain the meaning of, and to give full force and effect to, every enactment of the general assembly not obnoxious to constitutional prohibitions.

'It is equally true that a mere collection of words can not constitute a law; otherwise the dictionary can be transformed into a statute by the proper legislative formula. An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed.' State ex inf. Crow v. Street Ry. Co., 146 Mo. 155, loc. cit. 167, 168, 47 S. W. 959, loc. cit. 961."

* *

"In this connection it should be stated that 'in creating an offence the legislature may define it by a particular description of the act or acts constituting it, or may define it as any act which produces, or is reasonably calculated to produce certain defined or described results'. 8 R.C.L. p. 57.

It is clear that divisions Nos. 2 and 3 of said paragraph neither condemn an act by particular description nor condemn all acts which produce a certain described result.

> Furthermore, division No. 2 simply ordains that it is unlawful to do an unlawful act. Division No. 3 simply ordains that it is unlawful to 'harass, coerce or damage'. The words 'harass, coerce or damage' are not defined and the ordinance 'furnishes no criterion by which the questions of harassment, coercion and damage can possibly be determined.' * * * * * * * * * * * * *
>
> Thus it also appears that picketing is defined in Sec. 490b as mere solicitation and request. In this situation it cannot be determined from Secs. 490a and 490b, or from any part of the same, what offence was intended to be created. The rule is stated as follows:
>
> 'An ordinance of a regulatory nature must be clear, certain and definite so that the average man may, with due care, after reading the same, understand whether he will incur a penalty for his actions or not.' 19 R.C.L. p. 910.
>
> In other words, the said sections are vague, indefinite and uncertain, and for that reason void. It follows that it is unnecessary to consider the constitutional questions presented by the record.
>
> The petitioner should be discharged from the custody of the city marshal of Kirkwood. It is so ordered."

Applying the above principles to Section 13139-z-24, supra, it appears that said section is a law of a regulatory nature but is not "clear, certain and definite so that the average man may, with due care, after reading the same, understand whether he will incur a penalty for his actions or not;" that while "the language of the act appears on

its face to have a meaning * * it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate;" that since "no judicial certainty can be settled upon as to its meaning, courts are not at liberty to supply the deficiency or make the statute certain." The legislature has nowhere defined the meaning of the words "orderly house" or conversely a "disorderly house". Therefore, no specific offense has been prescribed which could result in a criminal prosecution.

We are not attempting to say that the Supervisor of Liquor Control can not revoke or suspend a license because of a disorderly house. Neither are we attempting to say that a dealer can not be tried criminally for maintaining a gambling house under the laws prohibiting gambling, or for maintaining a bawdy house under the laws prohibiting brothels, even though the existence of either in a dealer's place of business might, in a broad sense, be considered a disorderly house. We are only saying that the term "orderly house" is not sufficiently defined, nor is it precise or intelligible enough to constitute a crime in itself under the terms of the Non-intoxicating beer laws.

CONCLUSION

We conclude, therefore, that under the terms of Section 13139-z-24 of the Non-intoxicating beer laws, Laws of Missouri 1935, page 402, and that section only, a dealer can not be criminally prosecuted for failure to keep an orderly house.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RT

PROSECUTING ATTORNEY;

INSANITY HEARING:

Prosecuting Attorney should not accept appointment by the county court as attorney for an alleged insane person in an insanity hearing before the county court.

March 4, 1940

3-7

FILED
10

Hon. Fred C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri

Dear Sir:

This is in reply to your letter dated February 22, 1940, in which, in the following terms, you request our opinion:

> "By virtue of the provisions of Section 8646 found at page 511 of the Session Laws of 1937 the duty devolves upon the county court in a sanity hearing held before it to appoint an attorney for the alleged insane person and allow to him a reasonable attorney fee for the services rendered, unless an attorney appear for the alleged insane person at such hearing. Since, as a matter of actual fact the county court has jurisdiction solely of indigent insane, all insane persons with property have to pass through the probate court, no attorney ever appears for the alleged insane person and the court must appoint one. Is there anything improper in the county court appointing the prosecuting attorney to appear for and represent the alleged insane person and allowing to him a fee for such appearance? I do not find that it is anywhere the duty of the

> prosecuting attorney to represent the informant and I have felt that it would be perfectly proper for the court to appoint the prosecutor to represent the alleged insane person and allow and pay to him a fee. However, I do not wish to accept any such fee until such time as your office has passed upon the propriety of such conduct."

Section 8646 R. S. Missouri, 1929, as amended Laws of Missouri, 1937, page 509, section 1, Mo. Stat. Ann. page 7745, provides:

> "At the time appointed, unless the investigation shall be adjourned over to some other time, the court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician. If no licensed attorney appears for the alleged insane person at such hearing, the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

Section 11322 R. S. Missouri, 1929, Mo. Stat. Ann. page 604, provides:

> "If the prosecuting attorney and assistant prosecuting attorney be

> interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Said Section 11322, supra, appears to apply only to criminal cases. But it is expressive of a policy of the law that a prosecuting attorney should not accept employment as counsel in any case where such employment is inconsistent with the duties of his office, and is cited for that purpose. Further, universal recognition is accorded to the principle that generally a lawyer should not represent conflicting interests. An insane person entitled to due process of law, (Ussery v. Haynes, 127 S. W. (2d) 410, 414) would be incapable of consenting to his attorney's representing conflicting interests.

Section 6, Canons of Ethics of the American Bar Association, adopted as rule 35 of the Supreme Court of Missouri, 7 Houts, page 338, in part provides:

> "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interest when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client

> with respect to which confidence has been reported."

What are the duties of the prosecuting attorney to the county, in connection with the insanity hearing provided for by Sections 8636 to 8649, inclusive, R. S. Mo., 1929, as amended?

Section 11318 R. S. Mo. 1929, Mo. Stat. Ann. page 602, provides that the prosecuting attorney --

> "shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, * * * and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, * * * * * * * * ."

In Ussery v. Haynes, 127 SW (2d) l.c. 415, the functions of the county court in the insanity hearing were described by the Supreme Court as follows:

> "* * * The county courts are courts of record and, as pointed out above, to them alone is committed jurisdiction to commit persons to the state hospitals for the insane at the expense of their respective counties. In doing that they have authority and it is necessary to determine whether or not the person in question is insane. In exercising this jurisdiction they act judicially. * * * "

The county court must decide matters of law, such as,

for example the question, who are "insane poor" and who are "entitled to admission" (Sec. 8636 R. S. Mo. 1929, as amended Laws 1935, page 387, Sec. 1,Mo. Stat. Ann. page 7741). The function of committing a person to an insane asylum is clearly a legal proceeding. It follows that the insanity hearing and the court's functions constitute a matter of law in which the prosecuting attorney must "represent generally the county," as provided by Sec. 11318, supra. The county is interested in the subject matter of an insanity hearing. In State ex rel v. Guinotte, 257 Mo. 1, l.c. 11, 165 SW 718, l.c. 721 (51 L.R.A. (N.S) 1191 Ann. Cas. 1915 D, 658), the court in part said:

> "Who are the parties in interest in an inquest de lunatico under our statute? Manifestly (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, * * * (b) the person whose mind is under suspicion, the alleged crazy person, * * * * ."

In Painter v. Painter, 228 S. W. 538, l.c. 540, the Springfield Court of Appeals said, regarding an insanity hearing:

> "From this we see that under the rule declared the proper parties who were interested in the proceeding had in the county court of Lawrence county were the defendant and the public at large, represented and protected by the county court. A writ of certiorari would not only have tested the same question sought to be tried here, but would have brought into court those parties most interested in the proceeding. * * "

Regarding pecuniary interest, in State ex rel v.Wurdeman, 183 Mo. App. 28 l.c. 36, 37, 166 S. W. 348, the St. Louis Court of Appeals ruled:

"* * * While section 1007, in so far as its consideration here is essential, applies more particularly to cases in which the county is concerned and suits against it, section 1008 imposes a duty on the prosecuting attorney in respect of all civil suits in which the county is 'interested.'

"It is clear that the county is interested in a civil suit in mandamus directed against the judges of the county court by which it is sought to compel them, through utilizing the franchises of their office, to issue a dramshop license in favor of any citizen, authorizing him to sell intoxicating liquors in the county. In respect of this matter, it is to be said the judges of the county court, as individuals, apart from their office and the franchises which inhere in it could confer no privilege under the law, and it is only because of their office as county judges that they may be compelled to act thereon at all, and this is true though the writ runs against them as judges of the county court, rather than against the office of the county court eo nomine. The idea is to compel the judges, as individuals in whose hands the franchises pertaining to the office are accumulated, to exercise the powers of the office in acting upon the application for a dramshop license and thus proceed in the performance of a public duty affixed by statute. To say that St. Louis county is not even interested in such a proceeding involves but a partial view of the subject-matter. Under our statutes the county is

> pecuniarily interested in the matter of dramshop licenses, for a portion of the revenue received therefor goes into its treasury."

(Section 1008 R. S. Missouri, 1909, above referred to was to the same effect as Section 11318, R. S. Mo. 1929). In the Wurdeman case, supra, the county treasury was affected by the receipt of funds, and in this case the county treasury is affected by the withdrawal of funds. By analogy the county is pecuniarily interested in the matter of committing persons to the insane asylum, because by such proceeding money is paid out of the county treasury as provided by Section 8636, supra. Moreover, the county is interested in protecting the safety of the persons of its citizens from harm by acts of violent or dangerously insane persons, by temporary commitment to the county jail after a hearing (Sec. 8648 R. S. Mo. 1929) as amended, Laws of 1937, page 509, Sec. 1, Mo. Stat. Ann., page 7745).

Because the hearing is a "matter of law," and because the county is "interested", the prosecuting attorney must give his opinion to the county court or a judge thereof, as provided by Section 11318, supra. Being "interested" the county is "concerned", and the following provisions of Sec. 11321 R. S. Mo., 1929, Mo. Stat. Ann. page 604 are applicable:

> "The prosecuting attorney shall, without fee, give his opinion to any justice of the peace, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Other litigation may grow out of such hearing. On the part of the alleged insane person, certiorari will lie from an adjudication of insanity. The county is an interested party in such a proceeding (Painter v. Painter,

supra.) In such a civil suit it would be the duty of the prosecuting attorney to defend for the county as provided by Sec. 11318, supra.

On the part of the person who instituted the inquiry into insanity (Sec. 8643 R. S. 1929 as amended Laws 1937, page 509, sec. 1, Mo. Stat. Ann. page 7744) mandamus will lie to compel the county court to remove an insane poor person to the asylum and pay the expenses of his confinement (State ex rel v. County, 80 Mo. 80). This also is a civil suit. The county would be "interested" for the reasons already stated regarding the original hearing and proceeding on a writ of certiorari. It would be the duty of the prosecuting attorney to defend for the county as provided by Sec. 11318, supra.

What would be the duties of the prosecuting attorney to the alleged insane person if he represented such alleged insane person? At the hearing it would be his duty to give his opinion to such person, to develop all evidence which would bear on the issue of insanity, and to deny or admit insanity. Possibly, at such hearing, the attorney might deny insanity for the alleged insane person and assert insanity for the county. Conceivably for the prosecuting attorney to contest the issue of insanity at the hearing on behalf of an alleged insane person would be inimical to the county duty to protect citizens from harm by act of a violently and dangerously insane person.

If, after hearing, the prosecuting attorney's private client was adjudged insane and ordered committed to the asylum, and then applied for a writ of certiorari, the prosecuting attorney officially would be required to defend for the county against the person whom he had represented at the hearing.

From all the foregoing, it is clear that the official duties of the prosecuting attorney to the county in connection with the hearing would conflict and be inconsistent with his duties as attorney for the alleged insane person, and that the interests of the alleged person and the interests of the county may readily be inconsistent and in conflict with each other.

CONCLUSION.

It is our opinion that the prosecuting attorney should not accept appointment by the county court as attorney for an alleged insane person in an insanity hearing before the county court.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RW

LOTTERIES: Dividend card plan used by merchants giving prizes in varying amounts after $10.00 worth of purchases
LIQUOR : are made, constitute a lottery and violates regulations of Liquor Department.

June 29, 1940

6-29

FILED
10

Honorable Wallace I. Bowers
Chief Clerk
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your letter of June 25th, which reads as follows:

> "We would appreciate being advised as to whether or not dividend cards, per the enclosed sample, would constitute a violation of the provisions of Sub-section D, Regulation 8 of the Supervisor's Regulations.
>
> As we understand it, the customer is given a card, which when completely punched will represent $10.00 in purchases. The customer will then take the card to the store where the tab covering the free amount to be given in cash or merchandise will be pulled. This amount may be from twenty cents to ten dollars.
>
> In other words, would sales promotional schemes of this nature represent the winning or loosing of money, trade checks, prizes, merchandise, or any other consideration. Would the hidden amount in this respect create gambling as used in this particular Regulation."

The sample dividend card you enclosed contains a number of 5¢ punches, 10¢ punches, 15¢ punches and 25¢ punches, all of which total the amount of $10.00. The front side of this card also contains this language:

" Keep this Lucky Clover Card

WE PAY YOU DIVIDEND ON MONEY YOU SPEND

* NO BLANKS *

See Other Side of Card for Dividend you Receive"

The front side of the card also contains a closed panel, which is to be opened after $10.00 worth of purchases have been made by the customer and the card is completely punched out. On both sides of the panel is a picture of a four leaf clover. The back side of the card then explains what occurs after the card has been punched out in this language:

"NO BLANKS - Dividends up to $10.00

A Dividend on money you spend is given you in consideration of your efforts to advertise us to your friends. When this card is fully punched, bring it to us intact. We will open the Panel. You will receive a DIVIDEND printed therein of either 20¢, 25¢, 50¢, $1.00, $2.50, $5.00 or $10.00 ABSOLUTELY FREE. SHOULD YOU OPEN PANEL, CARD BECOMES VOID."

It will be observed that after the card has been fully punched out showing $10.00 in punches, the card is then to be taken to the merchant for the purpose of having the panel opened. The holder of the card then is entitled to receive a dividend "printed therein of either 20¢, 25¢, 50¢, $1.00, $2.50, $5.00 or $10.00 ABSOLUTELY FREE." The holder of the card in every case will receive at least 20¢, but has a chance of receiving as high as $10.00. The opened panel on the card you sent us shows that 20¢ would be paid on this particular card.

The question is whether this scheme is a lottery. We believe that it is. The law relating to lotteries is thus set out by the Supreme Court of Missouri in the case of State ex inf. McKittrick vs. Globe Democrat Publishing Company 110 S. W. (2nd) 705, l.c. 712, as follows:

> "Section 10, article 14 of the State Constitution provides: 'The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State.'
>
> Section 4314, R. S. Mo. 1929 (Mo. St. Ann. Sec. 4314, p. 3002), provides: 'If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony.'
>
> It will be noted both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been several times held that within their meaning and intent a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State v. Emerson, 318 Mo. 633, 639, 1 S. W. 2d 109, 111. The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious, in comparison

> with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. State v. Schwemler, 154 Or. 533, 60 P. 2d, 938; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529, 537, 253 S. W. 229, 231, 28 A.L.R. 1305, 1310; State v. Becker, 248 Mo. 555, 562, 154 S. W. 769, 771.
>
> The elements of a lottery are: (1) Consideration; (2) prize; (3) chance."

It will be noted that a lottery is any scheme or device wherein anything of value is for a consideration allotted by a chance. Here the customers purchase commodities sold by the merchant handing out the dividend card. This, undoubtedly, is a consideration. The prize will be at least 20¢ and it may consist of larger amounts up to $10.00. The varying amounts a person may receive are governed by chance. Chance has it whether the figure under the sealed panel is 20¢, $5.00 or $10.00 or any of the other amounts mentioned on the card. No one can tell in advance what prize he is to receive. The chance involved is the same as if numbers were drawn out of a hat upon which were written the prize the contestant would receive.

We are enclosing a copy of an opinion dated November 1, 1938, which was addressed to the Honorable Walter G. Stillwell, Prosecuting Attorney of Marion County, Missouri. In that opinion it appeared that an oil company was distributing coupon books, which were presented by the purchasers of gas and oil and stamps representing the amount of each purchase were then placed on the book. When the book was filled, a seal on the book was removed and the purchaser was then entitled to receive certain prizes according to the directions on the seal. The prize in any event was four quarts of oil and it could consist of five gallons of gas; grease job; oil changed; one gallon Phil-A-Penn Oil; 50¢ in cash; $1.00 in cash; $2.00 in cash; $5.00 in cash or $10.00 in cash. It is apparent that the scheme involved in the oil company case is the same in principle as the plan you inquire about. In both cases, the holder of the card

which has either been filled with stamps or punched out is entitled to some kind of prize, and if he is fortunate it might be quite valuable. Chance determ nes the value of the prize he will receive.

We held in the enclosed opinion that the oil company scheme was a lottery and, in our opinion and on the same reasoning, we believe the plan you outline is likewise a lottery and is therefore prohibited by law.

You inquire also whether this plan, if used by an operator of a tavern, would constitute a violation of the provisions of Subsection D of Regulation 8 of the Supervisor's Regulations. This subsection reads as follows:

> "No retail permittee shall allow upon his licensed premises, any gambling of any kind or character whatsoever in which the one who plays s tands to win or lose money, trade checks, prizes, merchandise, or any other consideration whatsoever. The presence of any gambling device upon any licensed premises shall create a presumption of a violation of this rule."

We have concluded that the plan is a lottery and that one who participates stands to win a prize. Consequently, any retail permittee, licensed by your department, who makes use of this plan, violates the regulation.

CONCLUSION

We conclude, therefore, that dividend cards of the type you describe, which are handed out by merchants and which contain a sealed panel showing the amount of prize a person will receive after making $10.00 worth of purchases, the amount of the prize being advertised as varying between 20¢ and $10.00, the exact amount of which will n ot be known

by the contestant until after $10.00 worth of purchases have been made, are in fact a lottery.

Furthermore, the use of any such device by a tavern owner or retail liquor permittee is in direct violation of Subsection D of Regulation 8 of the Supervisor's Regulations.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:RT

LIQUOR: Package goods dealer cannot give samples of liquor to customers and allow same to be consumed on premises.

8/9

July 19, 1940

FILED
10

Mr. Wallace I. Bowers
Chief Clerk, Department of
Liquor Control
Jefferson City, Missouri

Dear Mr. Bowers:

We have received your letter of July 11th, which reads as follows:

> "We respectfully request an opinion on the following subject:
>
> May a person, firm or corporation licensed to sell intoxicating liquor in the original package only give the customer a sample drink of a certain brand upon the premises covered by the permit. As we understand the question there is no sale involved, merely the breaking of an original package in order to offer the customer a sample of its contents.
>
> We would appreciate receiving this opinion at your earliest convenience."

Section 22 of the Liquor Control Act, Laws of Missouri 1935, page 274, relating to the licenses of dealers selling liquor in the original package, reads in part as follows:

> "Intoxicating liquor shall be sold at retail in the original package upon a license granted by the Supervisor of

> Liquor Control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in this act. * * * * * * * * * * Provided, however, that no license shall be issued for the sale of intoxicating liquor in the original package, not to be consumed upon the premises where sold, except to a person engaged in, and to be used in connection with the operation of one or more of the following business: A drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionery and/or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least one thousand ($1000.00) dollars, exclusive of fixtures and intoxicating liquors."

From the above language, we believe that it was the evident intention of the legislature that no bottles of liquor should be opened and consumed on premises covered by a package liquor license only. It will be observed that the principle business of a person licensed to sell liquor in the original package must necessarily be something other than the liquor business. The dealer must be operating a drug store, a cigar or tobacco store, a grocery store, a general merchandise or a confectionery or delicatessen, and must have a stock of such goods on hand exclusive of furniture and fixtures and intoxicating liquor of the value of at least one thousand ($1000.00) dollars before he is even eligible to obtain a package liquor license. It seems apparent that the legislature did not intend any drinking of any kind should be done in drug stores or grocery stores under a package goods license. In this connection, the Supreme Court of Missouri en banc in the case of State vs. Wipke 133 S. W. (2nd) 354, l.c. 357, said:

> "However, we conclude that the Legislature presumed that if a person went into

> a place of business where liquor was sold by the drink that he would not be shocked to find persons who were under the influence of intoxicating liquor, but if he went into a drug store or a grocery store he would certainly not expect to find such conditions existent."

The term "shall not be consumed on the premises where sold, nor the original package opened on said premises of the vendor" is a broad term and appears to cover the dealer, as well as the purchaser, and prohibits either from opening bottles of intoxicating liquor and consuming or allowing the same to be consumed on the premises. It would, therefore, make no difference whether the dealer gave drinks of liquor away as samples and free of charge. Since such drinks cannot by law be consumed on the premises, it would make no difference whether the same were given to a prospective customer, or whether the customer buys a bottle of whiskey and consumes his own liquor on the premises. The prohibited act appears to be the consumption of liquor on the premises with no distinctions made as to how or from whom the consumer receives the liquor.

CONCLUSION

We conclude, therefore, that a person, firm or corporation licensed to sell intoxicating liquor in the original package only may not give a sample drink of intoxicating liquor to a customer or prospective customer and permit and allow the same to be consumed upon premises covered by a package liquor license only.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:RT

FOODS AND DRUGS: Only licensed pharmacists may remove poisons from original package and dispense same in other packages.

August 20, 1940

9-13

FILED
10

Honorable Charles R. Bohrer
Secretary, Missouri Board of Pharmacy
West Plains, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of August 17, 1940, as follows:

> "The Board of Pharmacy respectfully requests an opinion from your department concerning the sale of Paris Green and poisonous insecticides by businesses not regularly employing a licensed pharmacist. The Revised Statutes of 1929, Chapter 94, Section 13140, reads as follows:
>
> ' * * * PROVIDED, HOWEVER, that nothing in this section shall be construed to interfere with * * * nor with the sale of poisonous substances which are sold exclusively for use in arts, or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes: * * '
>
> The Weston Milling Company, Weston, Missouri, according to a letter from them and other information received by this office, has been buying Paris Green, a poisonous insecticide containing a large amount of arsenic, in 270 pound barrels and repacking it in 10, 5 and 2½ pound tin cans and relabelling the

same as suggested by the Pure Food and Drug Department in 1938. These repacked cans are being sold direct to the consumers and are advertised for sale direct to the consumers according to our information.

It is the opinion of the Board of Pharmacy that the intention of the law is that such retailers shall not break and repack poisonous insecticides and that they can legally only sell such original unbroken packages as are received by them from the distributor, wholesaler, jobber or manufacturer. This part of the law was evidently intended to protect the public health by eliminating the weighing and handling of such poisonous substances by inexperienced and untrained people and to eliminate the possibility of contamination of food products where these items were handled in groceries, feed stores and similar places of business."

Section 13140, R. S. Mo. 1929, was amended by the Sixtieth General Assembly, the new section being found at page 369, Laws of 1939, and is as follows:

"It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison

or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist to compound, dispense or sell, at retail, any drug, medicine or poison except as an aid to or under the supervision of a person licensed as a pharmacist; provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes; provided, further, that in any village of not not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who has had one year's experience under the supervision of a registered pharmacist a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village

> for which such permit was granted shall become greater than five hundred: Provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, and in any locality where there is no licensed pharmacist, the ordinary household remedies and such drugs or medicines as may be specified by the board of pharmacy shall be permitted to be sold by those engaged in the sale of general merchandise: Provided, further, that nothing in this section shall be so construed as to prevent any person, firm or corporation from owning a pharmacy, drug or chemical store or apothecary shop, providing such pharmacy, drug or chemical store or apothecary shop shall be in charge of a licensed pharmacist."

We believe that the correct answer to your request is to be found in the Act itself. After several clauses prohibiting absolutely the compounding or dispensing of any drugs, medicines, chemicals or poisons, except by a licensed pharmacist, we find the following phrase:

> " * * * or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, * * * "

The only exception to which this phrase could possibly refer is the following:

> " * * * provided, however, that nothing in this section shall be construed to interefere with * * * nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides, when such substances are sold in unbroken packages bearing a

> label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes."

It will be readily seen that there is no authority in the exception for the compounding of a poison to be used as an insecticide by any person other than a licensed pharmacist, the exception plainly referring to the former phrase permitting a retailer to keep such poison exposed at retail in the unbroken package.

In 15 C. J. S., under the general title "Commerce", we find the definitions of the words "original package" and "unbroken package", which have apparently been considered as synonymous. We find the following on page 310 under Section 28:

> " * * * Where bottles or packages are fastened together and marked, or are placed in a larger box, barrel, crate, or other receptacle, and shipped therein, the outside box, bundle, or receptacle, and not any bottle or package contained therein, constitutes the original package, and this is true, although each bottle or package is separately wrapped in paper labeled 'original package' and marked with the name of the importer, and although the larger receptacle is furnished by the carrier. * * * "

And on page 311:

> "Imported articles lose their interstate character and become subject to state regulation when they no longer remain in the original package. This happens when the package is broken, especially where the larger receptacle

> is broken for the purpose of selling and delivering the smaller units, or where the property is otherwise mingled with the mass of property of the state. Goods are held to be no longer in the original package when they are sold or offered for retail sale by peddlers. The opening of a package for the sole purpose of examination or inspection is not such a breaking as will destroy its original character, but a contrary view has been taken. The borrowing of fixtures from goods in original crates or boxes by agents of a foreign corporation, to be replaced afterward without the sanction of the corporation being shown, does not of itself change the nature of a transaction otherwise interstate to intra-state commerce.
>
> Natural gas ceases to be part of interstate commerce and becomes subject to state laws when its bulk is broken up for indiscriminate distribution to individual purchasers at retail sale."

In the Federal Food and Drug Act the words "original unbroken package" are frequently used, and this is doubtless the source of the term "unbroken package" as used in the section above quoted.

In U. S. v. 65 Casks Liquid Extracts, 170 Fed. 449, affirmed by the Circuit Court of Appeals in 175 Fed. 1022, the casks in which liquids were shipped were held to constitute unbroken packages.

In U. S. v. Great Atlantic and Pacific Tea Company, 92 Fed. (2d) 610, the defendant was charged under a provision making it an offense to deliver in the original unbroken package any misbranded article. The facts disclosed that the defendant delivered prints of misbranded butter after they had been removed from a broken box. The court held that a conviction could not be sustained.

These cases, particularly that in which a cask was held to be the unbroken package, appear to apply to the facts at hand. It would also appear that this firm is violating Section 13140 R. S. Missouri, 1929, for another reason. The statute prohibits the dispensing of poisons, except under the supervision of a licensed pharmacist. We have found the following definitions of the word dispense:

> "'Dispense' has been defined: 'To deal out in portions; to distribute; to give.' Webster's New International Dictionary. 'To deal out; to apportion; to distribute. To dispense is to deal out generally or indiscriminately; to distribute, deal out to, or divide among individuals.' Worcester's Dictionary. 'To deal or divide out; give forth diffusively, or in some general way; practice distribution of.' Century Dictionary."

It is obviously hazardous to the public health to permit a firm engaged in the preparation of food products from grain to open a large container of highly poisonous substance on premises where such food products are produced, when such preparations are not under the supervision of those specially trained for such work. The segregation of paris green into smaller packages by the milling company and the placing of labels thereon, which we must assume were prepared by one not skilled in the use of poisons, or their antidotes, is undoubtedly a "dispensing" of poisons and not permitted by the statute, except under proper supervision.

It is therefore the conclusion of this Department that the dispensing and sale of a poisonous insecticide by a milling company in packages dispensed and labeled by such company, and not in the unbroken package, is a violation of Section 13140 R. S. Mo., 1929, as amended by Laws of 1939, at page 369.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

RLH:RW

GAME AND FISH:
CONSERVATION COMMISSION:
SALE OF RABBITS AT
RESTAURANT OR CAFE:

Persons who serve rabbits for a charge are not included in the definition of the term "retail vendor" and not required to have a permit under Conservation Commission Code Section 37, subdivision (1).

November 26, 1940

12-3 FILED 10

Mr. I. T. Bode, Director
Conservation Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an official opinion from this department on the question of whether or not an operator of a tavern, who serves rabbits to his customers, is required to obtain a "retail vendor's" permit from the Conservation Commission.

In the case of Marsh v. Bartlett, 121 S. W. (2d) 737, l. c. 744, the Court, in discussing the powers imposed on the Conservation Commission, said:

> "The sovereign people having enlisted the Conservation Commission as the constitutional agency to exercise the powers and functions granted in Amendment No. 4, it is not our function to consider or to determine the wisdom, the expediency or the policy to be executed by that body. * * * * * * * * * * * * * * * * *
>
> *
>
> "It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. * * * * * * * * * * * * * * * * *"

Pursuant to the provisions of Constitutional Amendment No. 4, and also of the Supreme Court in the above case, the Conservation Commission adopted certain

rules and regulations for the preservation and protection of the game and fish of this State, among which are the following which are pertinent to your question:

Section 27, page 3, of the Supplement to Wildlife and Forestry Code, State of Missouri, dated April 15, 1940, provides in part:

> "No wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed, and no equipment, material or facility for the taking of such wildlife may be used for such purpose by any person, other than one who at the same time has in his possession the required permit as hereinafter described; * * * * * * * * * * * * * *"

Section 37 (1), of said amended code, provides as follows:

> "Resident State Retail Vendor's Permit $1.00--To possess, transport, buy and sell, exclusively for retail purposes, rabbits and only such frogs and fish as are permitted to be sold by these regulations and which have been legally obtained from without this State, or from an authorized resident game breeder, or from the Missouri and Mississippi Rivers taken by the holder of a commercial fishing permit, and supported by a bill of sale, upon the payment of a resident retail vendor's permit fee of one dollar ($1.00)."

Section 101, page 39, of the Wildlife and Forestry Code of the State of Missouri, provides, in part, as follows:

> "For the purposes of these regulations and their application, the following definitions and interpretations shall govern unless a diferent meaning is clearly evident from the context, and where one or more synonymous names or words are used, they shall be deemed to be interchangeable. * * * * * * * * * * * *"

And, at page 46 of said Code in the same Section, the term "Sell, Sale and Disposal" is defined as follows:

> "Sell, barter, exchange, give away, including also the offering for sale, barter, exchange or gift; and applying in like manner to the seller or person offering for sale, barter, exchange or gift and to the recipient or buyer."

At page 47 of said Code, the term "Serve and Serving" is defined as follows:

> "Shall include the preparation of wildlife for human consumption as well as the serving or offering for consumption, whether or not a fee, charge, or other consideration is involved."

On the same page "Retail Vendor" is defined as follows:

> "Any person who possesses and sells or offers for sale for retail purposes, any rabbits, fish or frogs."

Your letter indicates that the Conservation Commission has held that the tavern operator who serves rabbits to his customers should obtain a "Retail Vendor's permit, as provided by said Section 37 (1), in order that he may comply with the provisions of the Code.

The answer to the question here involved depends upon whether or not the term "sale at retail" would include the person who serves rabbits and makes a charge therefor.

From our research on this question, we find two lines of authority, one holding that such a transaction is a sale at retail and the other that it is not.

In Volume 23, R. C. L., at page 1203, at Section 19, the rule, holding that such a transaction is not a sale, is stated as follows:

> "The common transaction between an innkeeper or a restaurant keeper and his customer under which the latter is furnished with food to consume on the premises is not a sale. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place on his plate or in side dishes set about it. No designated portion becomes his. He is privileged to eat and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over uncon-

> sumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire--ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered."

In the case of Misky, et al. v. Childs Company, the New Jersey Court of Errors and Appeals, cited at 50 A.L.R., at page 227, l. c. 229, said:

> "* * * From the earliest times, however, a distinction has been drawn between a sale of an article and the furnishing of food at an eating house, hotel or restaurant; the latter partaking rather of the character of service, in which case the standard of liability is the failure to use that reasonable care which the circumstances require. As was said many years ago in Parker v. Flint, reported in 12 Mod. 1303, 88 Eng. Reprint, 1303, 'An inn-

keeper . . . does not sell but utters his provisions,' and by Professor Beale in his treatise on Innkeepers, Sec. 169: 'As an innkeeper does not lease his room, so he does not sell the food he supplies to his guests. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs and to take no more. Having finished his meal he has no right to take food from the table, even the uneaten portion of the food supplied him; nor can he claim a certain portion of the food as his own to be handed over to another in case he chooses not to consume it himself.'

"The authorities distinguishing the transaction from a sale recognize that while the food served constitutes, of course, an essential part, yet serving it cannot be regarded as a sale of goods, and this we think the common understanding. A customer at an eating place seeks not to make a purchase, but to be served with food to such reasonable extent as his present needs require. With the service go a place, more or less attractive, in which to eat it, a table, dishes, linen, silver, waiters, and sometimes music as an accompaniment, all tending to render more agreeable and palatable that which he eats. The food he obtains is then and there consumed; he does not eat the portion he can comfortably devour and place the remainder in his pockets or other receptacle, to be stored away for future needs. So one who purchases a steamship ticket, or one who registers at a hotel, does not conceive the trans-

> action as a sale of goods when, as part of his passage in the one case, and as a guest in the other, he is supplied with meals; nor does one who enters a restaurant to be supplied with a meal or any portion thereof so regard the supplying of his food. This attitude of the public mind is indicated by the familiar signs, 'Meals served here,' 'Dinners served here,' and the like.
>
> "We think enough has been said to indicate that the service of food at eating houses has never been and cannot be regarded as a sale at common law, but this view is fortified by the absence of litigation (until quite recent years), based upon a claim of warranty, which would necessarily follow if the transaction constituted a sale. * * * * * * * * * * *"

In the case of Ex parte Mehlman, 75 S. W. (2d) 689, l. c. 690, the Court of Criminal Appeals of Texas said:

> "'A "Retail Fish Dealer" is any person engaged in the business of buying for the purpose of selling either fresh or frozen edible aquatic products to the consumer.'"

In this case the retail fish dealer's license was held to be the proper license to authorize the licensee to sell fish to the hotels, restaurants and cafes, because they were the consumers. This rule sustains the position that the restaurant, hotel and cafe operators are the consumers of the foods and not the retailers.

In the case of City of St. Louis et al. v. Smith, 114 S. W. (2d) 1017, in which the term "sale at retail" as de-

fined by the Missouri Sales Tax Act, was under consideration and in that case the Supreme Court of Missouri held that the contractor who had agreed with the City of St. Louis to construct a sewer and a street was the consumer under the terms of the Sales Tax Act, and that the retail sales' transaction took place between the party, or company, which sold the articles for the contractor to the contractor.

In the case of Brevoort Hotel Co. v. Ames, 196 N. E. 461, the Illinois Supreme Court held that the persons engaged in selling meals at restaurants and hotels were selling at retail and subject to the Sales Tax Act which defined sale at retail as follows:

> " Section 1 of the act (Smith-Hurd Ann. St. c. 120, Sec. 440) defines a 'sale at retail' as 'any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration.' * * * *"

In that case, however, the hotel was held to be a retailer of foods on account of the definition of the term "Sale at Retail" as defined by the Sales Tax Act of Illinois.

In our examination of the Code of the Conservation Commission, we fail to find where the term "Sale at Retail" is defined. Referring back to the case of City of St. Louis, et al. v. Smith, supra, it will be noted that the Supreme Court of Missouri refused to follow the definition and construction of the term "Sale at Retail" as defined by the Illinois Supreme Court, and by the cases supporting the opinion, in the Illinois case.

In the case of People v. Clair, 116 N. E. 868, the Court of Appeals of New York, held that the service of game and fish at a hotel, restaurant or cafe is a sale, in the following language (l. c. 869):

> "Clearly, if in a hotel where meals are served a la carte a partridge is ordered prepared and served as food and paid for as such, it would constitute a sale within the meaning of the statute. Commonwealth v. Phoenix Hotel Co., 157 Ky. 180, 162 S. W. 823. * * * * * * * * * * * * * * * * *"

This ruling was based on Section 180 of the Conservation Law of the State of New York, which provides as follows:

> "'The dead bodies of birds belonging to all species or subspecies, native to this state, protected by law or belonging to any family, any species or subspecies of which is native to this state and protected by law shall not be sold, offered for sale, or possessed for sale for food purposes within this state whether taken within or without this state, except as provided by sections three hundred and seventy-two and three hundred and seventy-three.'"

Referring to the Missouri Conservation Code and the amendments thereto, it will be noted that Section 27 of the Code, as amended April 15, 1940, includes the "serving" of wildlife in the prohibitions for which a permit may be required as thereinafter provided. However, in the sections of the Code providing for permits; Section 37 (h). Resident State Dead-rabbit Dealer's Permit; Section 37 (l). Resident State Retail Vendor's Permit; it will be seen that no permit is required for the person who serves dead rabbits in meals, unless it was intended that they be included in the term "Retail Vendor".

Since the Conservation Commission in its definitions and interpretations in Section 101, seems to have especially defined the terms "serve" and "serving", and "retail vendor"

and did not include the person who serves rabbits in meals for a charge in the definition of the term "retail vendor" we do not think the person who so serves such rabbits would be classed as a "retail vendor". These sections of the Code are penal, and, under the rulings of the Missouri courts they are to receive a strict construction and nothing can be read into these sections on account of intendment of the framers of the law.

CONCLUSION.

From the foregoing, it is the opinion of this department that the tavern operator, or the hotel operator, the restaurant operator, the cafe operator, or any other person who serves rabbits in meals for a charge, are not included in the definition of the term "retail vendor", and are not required to have a permit under Conservation Code Section 37 (1).

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

RECORDERS: Where chattel mortgages convey personal property, and also affecting real property, they should be recorded.

September 17, 1940

9-26

FILED
11

Honorable J. Jules Brinkman
705 Olive Street
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 21st, 1940, in which you ask for an opinion in the form of four questions set out below--

"1. May the Recorder of Deeds accept a copy of a chattel mortgage on a coal stoker for filing, in place of entering the contents in a book where the real estate in which it is installed is located in the City of St. Louis and the mortgagor resides in the City of St. Louis?

"2. When the holder of a chattel mortgage on a coal stoker presents said chattel mortgage to the Recorder for recording in the real estate records, for the purpose of giving constructive notice to the purchasers of the real estate, is it the duty of the Recorder to record it in such records if properly acknowledged?

"3. Where the owner of the chattel resides in St. Louis County and the chattel mortgage on the chattel in question has been properly recorded in St. Louis County and the chattel or fixtures is installed in real estate situated in the City of St. Louis, is it the duty of the Recorder to record said instrument in the real estate

records in said city when he is requested to do so, in order to give constructive notice to the purchasers of the real estate?

"4. Where the chattel is installed in real estate in St. Louis County and the owner of the chattel and the real estate is a resident of the City of St. Louis, is it the duty of the Recorder of the City to accept a copy of a chattel mortgage on said chattel where requested to do so, in order to give constructive notice to the purchasers of the chattel?"

Section 3097, Article III, Chapter 22, R. S. Mo. 1929, pertaining to chattel mortgages, is in part as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, * * * * * * "

This section gives the mortgagee two methods of securing the protection offered by the recording acts,

either to record the mortgage or have it filed. It is the privilege of the mortgagee to choose which method he desires. This section also directs in which county the record shall be kept.

The section above referred to is followed in the same article and chapter by Section 3099, which is amended in the Laws of 1935, page 209, which prescribes the charge for filing chattel mortgages, and Section 3100 also amended by Laws of 1935, page 208, which directs the disposition of chattel mortgages or copies which have been filed.

Section 11543 of Article 2, Chapter 74, R. S. Mo. 1929, makes it the duty of the recorder to record certain instruments and is in part as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; * * * * * * * * * "

There follows several other classifications of instruments.

It being the duty of the recorder by this last section to record the instruments named therein, and properly executed and offered for record, and the privilege being given the mortgagee in a chattel mortgage to either record or file the mortgage, or a true copy, it would follow that it is the duty of the recorder to accept for filing a chattel mortgage, or true copy thereof, when properly executed and offered for filing and the filing fee tendered. In Bank of Malden v. Wayne Heading Co., 198 Mo. App. 601, a case in which a corporation having its legal residence in Dunklin County had executed a chattel mortgage on personal property located in another county and had filed the mortgage in the county where the property was located and not in the county of its residence, the court held the

mortgage void as to third parties in the following language:

> "We hold therefore that the residence of the defendant corporation was in Dunklin County and that the failure to record the mortgage there made same void. * * * * * * * * * * "

Section 11544, R. S. Mo. 1929, requires that several classes of instruments mentioned in Section 11543, supra, shall be recorded in separate volumes according to their classification. Conveyance of real and personal property are both found in the first classification, and under this section the record of these two types of conveyances should be kept in the same volume. However, Section 11545, R. S. Mo. 1929, requires that instruments conveying chattels for personal property alone shall be kept in separate volumes.

In the case of Jennings v. Sparkman, 39 Mo. App. 663, the court, in discussing Section 3815, R. S. 1879, which is now Section 11545, R. S. Mo. 1929, at l. c. 668, said:

> "But the respondent contends that the deed falls within the provisions of section 3815 of the Revised Statutes of 1879, which provides:
>
> "'Instruments in writing, conveying chattels or personal property alone, which, by any law of this state, are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate.'
>
> "We are of opinion that this contention is not tenable. We concede the position, contended for, that instruments, in order to impart con-

> structive notice, must not only be recorded in the proper county, but also in the proper book, but we find nothing in the statutes, reading them together, or even seriatim, which leads to the conclusion that, where the same instrument affects real estate and conveys personal property, the law necessitates in all cases a double record. The word 'alone,' in the section last quoted, can certainly not be rejected as surplusage. It may reasonably be said that, where the real estate and personal estate to be affected, and the grantor's residence, are in different counties, the law necessarily contemplates a double record, one in the county where the real estate to be affected is situated, and the other where the grantor resides. It may also be justly claimed that, in such event, the record of the deed in the county where the grantor resides should be made in the personalty book, because as far as that county is concerned it affects personalty alone. This is the only construction that can be given to the various provisions of law on the subject, which harmonizes them all, and gives effect to each, and which is in harmony with the analogous decision in Anthony v. Butler, 13 Peters, 431."

This rule has been followed in the case of Faxon v. Ridge, 87 Mo. App. 299. Also in Long v. Gorman, 100 Mo. App. at page 45, in which the following quotation is taken:

> "This question is answered in the affirmative by the decision of this court in the case of Jennings v. Sparkman, 39 Mo. App. 663, where it was ruled that a deed of trust conveying

> both an interest in land, a lot of mules and other personal property, was properly recorded in the series of books kept for recording instruments affecting real estate, and that when so recorded it imparted constructive notice to the world that both the interest in the land and the personal property were conveyed by the instrument. The Kansas City Court of Appeals in Hume Bank v. Hartsock, 56 Mo. App. 291, approvingly cited the Jennings case.
>
> "This ruling seems to us to set a trap to catch even the diligent searcher for recorded mortgages on personal property, for who would think to look to the records wherein instruments affecting lands are required to be recorded for mortgages on personal property in view of the fact that the statute requires chattel mortgages to be recorded in a separate series of books? But we are not prepared to say that this court, in the Jennings case, misconstrued the statutes pertaining to the recording of these instruments, but are prepared to say that the Legislature ought to throw the trap by providing for the recording of these double-barreled mortgages affecting both real and personal property in both series of books, or by requiring the recorder to make an index that would direct the searcher to the book and place where they are recorded."

These cases and the statutes above referred to would furnish authority for recording in the real estate records conveyances which convey both real and personal property. In addition to the above statutory provisions, Section 3039, Article 1, Chapter 22, R. S. Mo. 1929, provides as follows:

> "Every instrument in writing that

> conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

In the case of Gaunt v. Alabama Bound Oil & Gas Co., 281 Fed. 653, the word "affect" is defined at l. c. 656, as follows:

> "* * Appellant urges that this suit was not of a nature to extend the term of the lease, because the words of the lease, a suit 'affecting the above-described premises,' refer to a suit which would hazard or injuriously affect the lessee's title. There are some instances in which the word 'affect' may be given this restricted meaning; but the usual meaning of the word 'affect' or 'affecting,' as referred to an object, is to act upon, operate upon, or concern such object, and suits of the nature of partition act upon the land and the title of the parties thereto. Nichols v. Voorhis, 74 N. Y. 28, 29; Ensworth v. Holly, 33 Mo. 370, 372; Munger v. Crowe, 219 Ill. 12, 15, 76 N. E. 50; Swigart v. Commissioners of Highways, 277 Ill. 281, 284, 115 N. E. 378; 2 Cor. Jur. 311. Webster's New International Dictionary defines the word 'affect' as to lay hold on; to act upon; to produce an effect upon; and gives, as synonymous, to operate, act on, concern."

An agreement which prevents a fixture attached to land from becoming a portion of the land to which it is attached under this definition would certainly be an instrument affecting real estate.

In the case of Kelvinator St. Louis v. Schader, 39 S. W. (2d) 385, the court, in holding that a chattel mortgage containing an agreement with fixtures attached to realty should not become a part of the real property, when a record only in personal property gave no notice of the agreement affecting the real estate, said:

> "This leads us to the inquiry as to whether the filing of the chattel mortgage in the city of St. Louis covering such applicances placed in a building in St. Louis county, furnishes such constructive notice as will enable the mortgagee to recover the property in question as against a third person not having actual notice.
>
> "It will be observed that section 3039 of our statute not only requires that every instrument in writing that conveys real estate shall be proved or acknowledged and certified in the manner prescribed and shall be recorded in the county in which such real estate is situated, but it also requires that every instrument in writing, whereby any real estate may be affected, shall likewise be proved or acknowledged and certified and recorded in the office in the county in which such real estate is situated. All other matters affecting real estate are required to be filed and recorded in the county where the real estate is located, and therefore it would be useless to file a deed of trust, a notice of lis pendens, a leasehold or a mechanic's lien claim in any other county than that in which the property is located. If, therefore, it is necessary to prevent an article from becoming a fixture by reason of the fact that it is a part of a complete system, that the mortgage affecting the same

> shall be recorded in the county where the real estate is situated, a recording thereof in any other place would be as ineffectual as if it was not recorded at all, and consequently would be binding only between the parties to the mortgage, and would furnish no notice to third parties. Barnard State Bank v. Lankford, 223 Mo. App. 519, 11 S. W. (2d) 1084, 1087."

CONCLUSION

From the above sections of the statutes and cases it is the conclusion of this department that it is the duty of the recorder of deeds to accept for filing a chattel mortgage, or a true copy thereof, when properly executed by a resident of the county and tendered for filing together with the proper filing fee; that if it is not of record in the county where the mortgagor resides it is not valid against third persons without actual notice; that any instrument which affects real property must be recorded in the county where the real estate is located to furnish notice.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WOJ:DA

OFFICERS AND EMPLOYEES:
WITNESS FEES AND EXPENSES: Public officers and employees may be reimbursed out of the treasury for expenses instant to attendance in response to a subpoena, and whatever amount is collected by such officers as witnesses and for mileage should be turned into the state treasury.

January 22, 1940

1-23

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following statement:

"This office desires your opinion or ruling in regard to the matter of claiming, collecting and retaining of witness fees by employees of my several departments who appear or may appear in State and Federal Courts as a witness.

"Should the employee to whom the subpoena is directed or who is designated by me to appear as a witness if the subpoena is directed to me, or the head of one of my departments, claim his attendance collect and retain same and not make any claim against the state through this department for expenses incident to such attendance; or should he present a claim against the state through this department for his expenses incurred by reason of his attendance and claim and collect witness fees due him and turn the same into his department or State Treasury; or should he not make any claim for or collect any witness fee, but make claim for his expenses against the state through this department or the department in which he is employed."

Section 11798, R. S. Missouri 1929, which deals with the subject of witnesses and their fees, provides as follows:

> "Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, $1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, or before such justice, and withdrawn himself

> from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

Section 3837, Laws of Missouri 1939, page 357, provides as follows:

> "No officer, appointee or employe holding a state, county, township or municipal office, including police officers and policemen, either by election or appointment, shall claim, be allowed or receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury, or in any criminal cases. All officers, appointees and employes as aforesaid, shall be compelled to attend the trial of all criminal cases, coroner's inquests and grand juries, when legally subpoenaed: Provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the trial or coroner's inquest is held, or where the grand jury is in session."

This last section has to do with fees in criminal cases. It will be noted that this section prohibits public officers or employees from claiming witness fees or mileage in criminal cases and hearings before a grand jury or at coroner's inquest in which such officer is not compelled to travel more than five miles. In case such officer or employe travels more than five miles in response to a subpoena, as is provided for in said Section 3837, then it seems that he would be entitled to compensation and mileage the same as any other witness.

On the question of public officers collecting fees

and expenses as witnesses, we find the rule stated in Volume 70 Corpus Juris, page 71, Section 72, as follows:

> "Allowance of witness' fees to public officers is determined by the statute and whether claimant is within its terms. The fact that one who is subpoenaed and attends as a witness is a public officer does not, in itself, generally defeat his right to compensation; but an officer who is called on to testify while present in court in the performance of his official duties is not entitled thereto, the distinction between attendance by a public officer in performance of duty and attendance merely as a witness being specifically made in some statute. A statute prohibiting a policeman accepting a fee for any service related to the duties of his office does not make it unlawful for him to accept a witness' fee, testimony in court not being regarded as a service related to the duties of his office, * * * * * * "

In State ex rel. v. Gifford, 70 Mo. App. 522, the question of whether a policeman in Kansas City was entitled to witness fees in the case in which he gave testimony was involved. In that case it was shown that the Charter of Kansas City, for the purpose of creating a fund for a police relief association, provided in part as follows (l. c. 526):

> "* * * And in addition, members of said relief association shall be allowed witness fees in all cases in all courts of record; also, in all municipal or city police courts, coroners' inquests, justice of the peace courts, whenever attending therein in matters pertaining to

> the discharge of their duties as witnesses; said witness fees to be collected solely by such officer as may be designated and authorized to collect the same, under the corporate authority of said relief association, and for its exclusive benefit; and no judge, justice of the peace or presiding officer of said courts or tribunals shall have power to remit any witness fees legally belonging to any member of said relief association, organized and existing as aforesaid.' * * * * * * * * * * * * * * "

And at l. c. 528, the court in the same case, in speaking of the contention of the defendant, said:

> "But the defendant insists that police officers are not entitled to witness fees for attendance at the police court, because they receive a salary which includes all such services. To sustain this contention a sentence appearing in paragraph 17, of section 1, article 3, of the city charter, before alluded to, is relied on. The particular clause reads: 'And that no officer receiving a salary shall receive any fees or other compensation for his services.' The foregoing language occurs in the general and specific powers granted by the charter to the mayor and common council. They 'shall have power by ordinance,' says that instrument, * * * 'to establish the salaries of all officers and the compensation of all employees * * * except as is otherwise provided in this charter: provided that the salary, fee, or compensation of no officer shall be

> changed during the term for which he is elected or appointed, and that no officer receiving a salary shall receive any fees or other compensation for his services.'"

Again at l. c. 529 in the same case the court said:

> "Again, even to concede that the clause of the charter prohibiting a city officer from receiving fees or other compensation than his salary for his 'services' should apply to police officers, it can, by no reasonable stretch of language, be made to cover fees such officer may be entitled to as a witness in a cause, whether such fees be earned in attendance on a police or other court. * * * "

Following the ruling in the Gifford case, supra, it seems that the court took the view that an officer might receive compensation as a witness in a cause and not violate the law as to increase of compensation or salary during his term of office. An employe or a state official might receive and retain a witness fee and not be violating the statutes which prohibit the increase of salary during the term of office.

In the case of Sackett v. Sanborn, 91 N. E. 133, 134, the Supreme Court of Massachusetts had before it a statute somewhat similar to Section 3837, supra, insofar as it refers to officers receiving fees as witnesses applies, and the court said:

> "* * * * The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of

> witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but not in the performance of the duties for which they are paid, at a place other than their residence, then, according to the provision quoted above from section 44, instead of their expenses they are to be allowed witness fees. * * * * * * * * * * "

Applying the rule announced in the Sackett v. Sanborn case, supra, to the provisions of Section 3837, supra, of the Missouri law, it would seem that where an officer testifies in a criminal case or before a coroner's inquest or before a grand jury and does not have to travel more than five miles to the place of giving such testimony, then he would not be permitted to charge or collect a witness fee therefor but would be compensated for his expenses necessarily incurred in the same manner that he is compensated for expenses in performing any other official duty. However, in a case where such an officer or an employe is required to travel more than five miles for the purpose of giving such testimony, then it seems that the lawmakers have intended that he would be permitted to claim his witness fees and mileage for such services and attendance.

There is no doubt but that if a state officer or his employe is subpoenaed as a witness to testify in either a criminal or civil case that he is compelled to respond to such subpoena and testify. This duty is imposed upon him whether he appear as an officer or as a private citizen. We think the rule as it applies in cases where an officer is compelled to furnish testimony is stated in 46 Corpus Juris, Section 246, page 1018, as follows:

> "The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a

> provision of the constitution or a statute conferring it either directly or by necessary implication, and the officer cannot recover compensation additional to the compensation fixed by statute for such expenses. But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done. * * * * * * * * * * * * "

So if the officer or employe, by virtue of his office, is compelled to appear as a witness and testify, he does so as a part of his official duties and should be reimbursed for his expenses incurred thereunder in the same manner as he is recompensed for expenses incurred in performing any other official duty.

In case such officer or employe is authorized to claim witness fees and mileage as a witness, he may do so, but since he has been paid his expenses and salary by the state, then such witness fees and mileage should be turned into the state treasury. We fail to find much statutory authority which requires the officer or employe to turn into the state treasury fees and mileage when collected, however, in the Highway Patrol Act in Section 11, page 234, Laws of Missouri 1931, it seems to be indicated that the lawmakers intended that witness fees by highway patrolmen be handled in the manner hereinbefore stated. This section provides as follows:

> "The necessary expenses of the members of the patrol in the performance of their duties shall be paid by the state when such members are away from their places of residence or from the district to which they

> are assigned, subject to the approval of the commission. All fees for the arrest and transportation of persons arrested and witnesses' fees for members of the patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law."

In connection with this question, I am enclosing a copy of an opinion rendered by this department in June, 1938, to Captain Thomas L. Leigh of the State Highway Patrol and written by Mr. Max Wasserman. This opinion somewhat supports the view that we are taking in our conclusion here.

CONCLUSION.

From the foregoing it is the opinion of this department that should an official of the state or any employe be subpoenaed to appear as a witness, either in a civil or criminal case, except criminal cases in which such officer or employe is not required to travel more than five miles, shall claim his attendance and collect for same.

We are further of the opinion that such officer or employe may present his claim through the department in which he is employed for the expenses which he incurs by reason of his attendance as a witness and when the witness fees and mileage are paid for such attendance, then such party should turn the same into the state treasury.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

ELECTIONS: Form of application for ballot and envelope for return of ballot by absentee voter in army or navy.

September 17, 1940

11-17

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion under date of September 16, 1940, in which you submit for approval a form of application for an absentee ballot to be filed by a person outside the State of Missouri in the United States army or navy, together with a form of envelope in which the ballot of such absentee voter is to be returned, and your supplemental request in which you ask whether or not an officer in the United States army or navy may take the oath of such absentee voter.

In pursuance to the mandate of the Missouri Constitution, the legislature has enacted laws to enable those in the military or naval service to cast their ballots when absent from the state. This constitutional provision is Article VIII, Section 9, and is as follows:

> "Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

The statute providing for the application for a ballot to be made by an absent voter who is a member of the Missouri National Guard and has been called into the service of the national government is Section 10226, R. S. Mo. 1929, which is as follows:

> "Any absent voter as defined under the provisions of this article, who shall have complied with the provisions of the law relating to registration whether by the form outlined in section 10225 of this article or in person may make application by mail not more than fifteen nor less than five days prior to such election, to the county clerk of the county of which he is a resident, or board of election commissioners of the city of St. Louis or clerk of the city, town or township, as the case may be, for an official ballot to be voted at such election."

We note that this section does not require that the application for an absentee ballot be made under oath, and we believe that the following form is sufficient:

"APPLICATION FOR ABSENTEE BALLOT FOR PERSON OUTSIDE THE STATE, IN THE UNITED STATES ARMY OR NAVY, AS REQUIRED BELOW.

(Sec. 10226, R. S. Mo. 1929, and pages Nos. 383-384 of session acts of the State of Missouri for 1939)

I hereby make application for an absentee ballot to be voted in the _____ election, the _____ day of _____ 19__
(Month) TWP._____

I hereby certify that I am a qualified voter in the _____ Prec. Ward _____
(City) (County)

I certify that I will on the date of said election, be absent from the state on account of military or naval service at _____.

I hereby certify that the above and foregoing statements are correct.

Signed _____"

We also suggest that the following be printed on the form of application by way of endorsement for the convenience of the local officer in filing the application:

"APPLICATION FOR ABSENTEE BALLOT
FOR PERSON OUTSIDE THE STATE, IN
THE UNITED STATES ARMY OR NAVY

Name _____

Address _____

_____

_____

Filed in my office, this _____

day of _____, 19____

_____
County Clerk.

By _____
Deputy.

_____"

The statutes in regard to the manner of returning the ballot to the proper officer to be officially voted and counted are Sections 10227 and 10228, R. S. Mo. 1929.

"The clerk or other proper authority upon receipt of application and as soon as the official ballot has been completed and printed, shall

send by registered mail, postage prepaid, to the address the elector may indicate for a general election, one ballot each of the political parties and such other ballots as are to be voted for at said election, together with an official envelope for returning ballot or ballots voted, with the name, official title and address of such county, city, town or township clerk or other proper authority upon the face of said envelope and upon the back of said envelope the affidavit of said elector, which shall be substantially in the following form:

AFFIDAVIT.

State of _____)
) SS.
County of _____)

I, _____, do solemnly swear that I have resided in the state of _____ for one whole year next before making this affidavit, and have resided in _____ county (or city as the case may be) for more than sixty days prior to this date and that I am in all respects a duly qualified elector of _____ township (or ward); that I reside at _____; that I am a _____, and that because of my duties I am required to be absent from my voting precinct in my said county (or city as the case may be) on the day of election to be held _____, 19__, and have had and will have no opportunity to vote thereat and that I have not voted and will not vote elsewhere at this election.

_____

Subscribed and sworn to before me this ____ day of _____, 19__.

_____
Notary.

"The elector shall upon receipt of a ballot or ballots, go before an officer authorized by law to take oath, administer and make and subscribe to the affidavit on back of envelope in which ballot or ballots are to be enclosed, and the voter shall thereupon in the presence of such officer and no other person, mark such ballot or ballots, but in such manner that said officer cannot know how said ballot or ballots were marked, and the ballot or ballots voted shall, in the presence of said officer, be folded by such voter so that each ballot will be separate and so as to conceal the marking and be enclosed in the envelope in which the affidavit was taken, in the presence of said officer, and in case there are rejected or unvoted ballots, the voter shall fold such ballots together and enclose in another envelope marked 'unvoted ballots' and enclose such envelope in the same envelope with the voted ballots which shall be securely sealed and registered to the office from which ballots were received, as per address on face of envelope. Provided, however, the official capacity of any notary of another state shall be verified by a proper certificate showing the authority of such person to take affidavits: Provided further, any elector may make application to the clerk, whose duty it is to issue ballots as defined by this article for an official ballot, if such ballots are in such officer's hands, and take oath as prescribed and vote and said clerk shall hold said ballot in his office until time to be sent to the precinct at which said elector is a qualified voter as hereinafter defined. Provided, however, that all absentee ballots shall be in the hands of the county clerk

> or other official whose duty it is to forward ballots and election supplies to the various voting precincts not later than sixty-six hours preceding the time for opening the polls at such election. And the clerk shall note upon the envelope containing such ballots, the day and hour which he received same."

The envelope submitted is that used by resident voters of the state who are temporarily absent from their respective wards or precincts, and differs somewhat from the form required in Section 10227, supra. We believe that the wording of the affidavit should be changed to conform to the above statute. We are of the opinion that the form on the reverse of the envelope should be used when the new envelopes are printed.

In regard to your question concerning the authority of officers in the military and naval service of the United States to administer oaths, we direct your attention to Section 1784, R. S. Mo. 1929, which is as follows:

> "Oaths, affirmations and commissions to take the deposition of any person without this state engaged in the military service of the United States may be executed before and by an officer in the said service above the rank of lieutenant; and of any person engaged in the naval service of the United States before any officer in that service above the rank of ensign; and affidavits and depositions of such persons so taken, if otherwise taken in accordance with law, shall be received and may be used in evidence, or for any other purpose, in the same manner as if taken before any officer now authorized by the laws of this state to administer oaths and affirmations or take depositions."

Under this statute, affidavits by any person without the State of Missouri taken before any officer in the United States army above the rank of lieutenant, and the affidavits of any person in the naval service taken before any officer in the United States navy above the rank of ensign, are valid, and when in this form on the envelope in which the ballot of such person is returned should be received by the official to whom such ballots are properly addressed as a proper affidavit.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

ELECTIONS: Ballots may not be counted for nominee, even though straight ticket is voted, where his name does not appear on ballot.

November 20, 1940 11/20

FILED 12

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for an opinion dated November 15, 1940, which may be briefly summarized as follows:

In St. Francois County no candidates were nominated in the Primary on the Republican Ticket for member of Congress from the Eighth District of Missouri, and for Judge of the Twenty-seventh Judicial District, St. Francois County lying within the bounds of both districts. Application for absentee ballots were made in some instances thirty days prior to the date of the General Election, as permitted by law, and the County Clerk immediately furnished such applicants with absentee ballots which did not contain the names of candidates for Congress and Circuit Judge on the Republican Ticket, because no such candidates had been nominated by a Primary, or otherwise. A certificate of nomination was received by your office naming Park M. Banta as a candidate for Congress, which was mailed to the County Clerk at Farmington on Monday, October 14, 1940. The certificate of nomination of Frank K. Fenwick as candidate for Circuit Judge on the Republican Ticket was mailed to the County Clerk by your office on October 19, 1940, which was the day on which it was received.

Your specific question is:

May ballots be counted for these two candidates where straight Republican Tickets were voted by such absentee voters who had received their ballots before the names of the above candidates were printed thereon and where no name, either written or printed, appeared in the proper places for candidates to such offices?

Section 10181 found in Laws of 1933, at page 219, provides that any person who is a qualified elector who expects to be absent from his county on the day of any general election may vote an absentee ballot.

Section 10182 found in Laws of Missouri, 1935, page 264, provides that this application may be made not more than thirty nor less than five days prior to an election for an official ballot to the County Clerk, or other proper officer, who shall furnish him with a ballot. It appears, in view of the dates given above, that it was impossible for ballots furnished to those absentee voters who applied for their ballots, prior to the time that the supplemental certificates of nomination were received by the County Clerk, to have contained the names of the two candidates above.

Our attention is directed by the letter accompanying your request for an opinion to the case of Bradley v. Cox, 271 Mo. 438. The facts in that case were very different from those at hand. The opinion was that the contestant John H. Bradley duly filed as a candidate in the Primary election, and defeated Arch A. Johnson for nomination as Judge of the Springfield Court of Appeals. Through an error by the County Clerk of Maries County the Democratic ballot contained the name of the defeated candidate Arch A. Johnson as nominee for the office, although he had been previous-

ly defeated. In that case the votes in question were cast for the nominee for the Court of Appeals, evidencing the intention of the voters to cast their ballots for the Democratic candidate. In the case at hand no names appeared and the absentee voter may have cast his ballot at a time when there was in fact no nominee on the Republican Ticket for either Congressman or Circuit Judge and had the names of such candidates appeared the voter might have desired to cast his vote against both, or either of them, and those counting such absentee ballots should not attempt to read into the ballot a name which does not appear, and for whom such voter may have not desired to vote. A search of the Missouri cases fails to reveal any mention of a similar state of facts under consideration. In Rollins v. McKinney, 157 Mo. 656, the contestee had been nominated by the Republican Party at a Primary election for the Seventh, Thirteenth and Fourteenth Wards in Kansas City, and his name was properly certified for those wards. The voter in the same district, but outside these particular precincts had failed to certify his name and McKinney had furnished the Judges in three precincts with a rubber stamp containing his name which was stamped on the ballots furnished voters in certain precincts. We find the following in the opinion of the Court,(l. c. 665):

> "* * * The ballots prepared and printed by the clerk as required by the statute and which were to be voted at this election for the office of constable of the 'Eighth district of Kaw township,' were duly delivered to the judges of election. But the eighteen ballots in question cast for that office, were not the ballots which the judges of the election received, and which the statute required should by them be delivered to the electors and by them be cast for that office. The statu-

> tory ballot for that office was a blank space on the Republican ticket, under the title of the office, in which the elector might write the name of his choice for that office, and by which he was advised of the fact that there was no nominee of that party for that office at that election. * * * And it is these false ballots for that office, manufactured by the judges of the election, without any authority of law, and in flagrant violation of their official duties, that were counted for the contestee in the court below. These were certainly ballots other than those printed according to the provisions of the statute, the casting and counting of which is thereby expressly prohibited, and the court in counting them for the contestee committed error for which its judgment will be reversed and the cause remanded for new trial."

Also, in Bradley v. Cox, 271 Mo. 438, mentioned above, we find the question squarely decided by way of dictum, in the following language, (l.c. 450):

> "* * * Nor is there any provision of law permitting the voter to write in the name of a nominee which has been inadvertently omitted or misprinted. * * * "

CONCLUSION.

In view of the foregoing authorities, it is the conclusion of this department that absentee ballots which did not contain the names of nominees for Congress and Circuit Judge, and which had been lawfully prepared by the County Clerk, prior to his receiving certificates of nomination for such offices, could not be counted for such nominees where no names were found designating the voter's choice for these offices when the ballot was cast and returned by the voter.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

NUISANCES;

CITIES OF THE THIRD CLASS:

Right of a city of the third class to declare a solicitor or canvasser a nuisance and to prevent him from entering upon private property.

November 25, 1940

11/27

FILED
13

Hon. Alpha L. Burns
City Attorney
Marceline, Missouri

Dear Sir:

Your letter of November 22, 1940, is acknowledged, wherein you submit the following:

> "Marceline has in force an ordinance commonly known as GREEN RIVER ORDINANCE.
>
> The Kingdom of God People came in and distributed literature and accepted donations for it. Magazine agents came in and took subscriptions for future delivery of magazines, which magazines were printed in a foreign state.
>
> This ordinance prohibits soliciting of any character by knocking at the door etc. Declaring knocking at the door of a residence a nuisance. I would like your official opinion as to the validity of this ordinance under the constitution of the United States and of Missouri and under the laws of Missouri relating to third class cities * * * "

It is assumed that the ordinance involved is the same as the Green River, Wyoming ordinance (Town of Green

River v. Fuller Brush Company, 65 Fed. 2d 112, l.c. 113), which is as follows:

> "'Section 1. the practice of going in and upon private residences in the Town of Green River, Wyoming, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor.
>
> 'Section 2. The Town Marshal and Police Force of the Town of Green River are hereby required and directed to suppress the same, and to abate any such nuisance as is described in the first section of this ordinance.
>
> 'Section 3. Any person convicted of perpetrating a nuisance as described and prohibited in the first section of this ordinance, upon conviction thereof shall be fined in a sum not less than Twenty-five ($25.00) Dollars or more than One Hundred Dollars ($100.00), together with costs of proceedings, which said fine may be

> satisfied, if not paid in cash, by execution against the person of anyone convicted of committing the misdemeanor herein prohibited.

It is assumed for the purpose of determining the validity of the ordinance that such solicitors and transient vendors do not breach the peace or create a disturbance (See Prior v. White, 180 So. 347, 116 A. L. R. 1176, and White v. Town of Culpeper, 1 SE 2d 269) in the exercise of their vocation.

The Constitution of the United States, Sec. 8, of Article 1, provides:

> "The Congress shall have power:
> * * * * * * * * *
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
> * * * "

While Amendment 1 provides:

> "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

And Section 1 of Amendment XIV provides in part as follows:

> "* * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5, Article II of the Missouri Constitution provides in part as follows:

> "* * Liberty of Conscience. -- That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; * * * * "

Section 14, Article II of the Missouri Constitution provides as follows:

> "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

And Section 30 of Article II of the Missouri Constitution provides as follows:

> "Due process of law.-- That no person shall be deprived of life, liberty or property without due process of law."

Marceline, a city of the third class, has the power, by virtue of Section 6803 R. S. Missouri, 1929, "to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

The principal question to be determined in settling the sufficiency of the ordinance is whether a municipality, in the exercise of its police powers, can forbid canvassing or soliciting, by declaring that it is a nuisance. See notes 88 A. L. R. 183 and 116 A. L. R. 1189, 13 Boston L. R. 98, 46 Harvard L. R. 154, 23 Minn. L. R. 88. However see 81 Pa. L. R. 331, in which it is said: "The constitutionality of this ordinance does not depend on whether or not the act prohibited is called a nuisance. Only two considerations are important. First, had the plaintiff a constitutional right to go onto all private residences for the purpose of selling its wares? Second,had those residents who desired salesmen to come to their homes a constitutional right that the salesman should come without previous invitation? * * * "

The power under which everything necessary to the protection of the health and comfort of the public may

be done is called the police power. This power as defined by Blackstone, concerns "The due regulation and domestic order of the Kingdom." (4 Bl. Com. 162.) The source of the police power of a municipal corporation is the state (State ex inf. Barker v. St. Louis Merchants Exchange, 269 Mo. 346, 190 S. W. 903; 43 C. J. 203), and although this police power primarily inhers in the state, the Legislature may delegate such power to the municipal corporations (McQuillin on Municipal Corporations. Vol. 3, Sec. 949; Jackson vs. Railroad, 157 Mo. 621, 58 S. W. 32).

However, to justify a municipal corporation under its police power, in regulating for the benefit of the public, it must appear first that the interests of the general public, and not that of a particular class, or individual, requires it, and, second, that the means are appropriate and not an unwarranted restraint on the private rights or property of individuals. (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499).

A municipal corporation in exercising its police power cannot arbitrarily prohibit business, lawful in itself, and not injurious to the public health, safety or morals. (Hadacheck v. Sebastian, 239 U. S. 394, 39 Sup. Ct. 143.)

Under this regulatory power, however, it has been held that a municipal corporation can require persons in various pursuits to be licensed. Our Supreme Court in Ex parte Williams, 139 S. W. (2d) 485, held good an ordinance of the City of St. Louis prohibiting solicitation of funds for charitable purposes without first securing a permit from a charity solicitations commission, (See also St. Louis v. McCann, 157 Mo. 301, City of Washington v. Reed, 70 S. W. (2d) 121, 229 Mo. App. 1195.)

It must be noted a municipal corporation can not impose a license tax upon one soliciting within the city

for a corporation or company of a foreign state who ships articles pursuant to such orders from another state to the purchasers, since such transactions are in interstate commerce and are not subject to regulation by municipalities. Robbins v. Taxing District, 120 U. S. 489, 30 L. Ed. 694; California v. Reback, 204 S. W. 389.

As said in the recent case of Cantwell v. Conn., 84 Law. Ed. 836, which case involves the solicitation by members of a group known as Jehovah's Witnesses: "The state (and therefore a municipal corporation) is likewise free to regulate the time and manner of solicitation in general in the interests of public safety, peace, comfort and convenience. * * * "(Parenthesis and underscoring ours.) An ordinance forbidding canvassers from calling at unreasonable hours of the morning or night was held valid in Buffalo v. Schleifer, 21 N. Y. S. 913.

It is well settled that a city has the right under its police power to prevent and remove nuisances, Lux v. Milwaukee Mechanics Insurance Company, 15 S. W. (2d) 343, (Mo. Sup.), Waggoner v. City of South Gorin, 88 Mo. App. 25.

A nuisance is anything that worketh hurt, inconvenience or damage. 3 Blackstone Commentaries 216; Martin v. St. Joseph, 117 S. W. 94, 136 Mo. App. 316. There are two types of nuisances: Common or public nuisances, and private nuisances. Lademan v. Lamb Construction Co., 297 S. W. 184; State v. Springfield Gas Company, 204 S. W. 942.

In Schnitzer v. Excelsior Powder Mfg. Co., 160 S. W. 282, the distinction between a public and private nuisance is given as follows:

> "A nuisance is * public where it affects the rights enjoyed by citizens as part of

> the public, that is, the rights to which every citizen is entitled, whereas a private nuisance is anything done to the hurt, annoyance, or detriment of the lands, tenements, or hereditaments of another, and not amounting to a trespass; thus any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, constitutes a private nuisance. It will thus be observed that the difference between public and private nuisances does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals, and so the same act or structure may be a public nuisance and also a private nuisance as to a person who is thereby caused a special injury other than that inflicted upon the general public; while, on the other hand, the fact that a nuisance injures a great many persons does not make it a public nuisance, where the injury is to the individual property of each person and not the general public as such.'"

In the case of a public nuisance an indictment lies to abate them and to punish the offenders, but an information also lies in equity to redress the grievances by way of injunction. State v. Springfield Gas Co., 204 S. W. 942; Mugler v. Kansas, 123 U. S. 672, 8 Sup. Ct. 303.

Private nuisances are merely actionable by the individual injured, either by way of injunction or suit

for damages. Smith v. Sedalia, 53 S. W. 907, 152 Mo. 283, 46 C. J. 647.

Under the general grant of power respecting nuisances the municipal corporations may declare a thing a nuisance which is one in fact. Walther v. Cape Girardeau, 166 Mo. App. 467, 149 S. W. 36. But it cannot declare by ordinance that something is a nuisance which is not so in fact. St. Louis v. Heitzberg, 141 Mo. 375, 42 S. W. 945; Kansas City v. McAleer, 31 Mo. App. 433. Under this rule a declaration on the part of the city that a particular thing is a nuisance is not conclusive unless the thing declared against is a nuisance per se at common law (Hisey v. Mexico, 61 Mo. App. 248, or has been declared such by statute, Allison v. Richmond, 51 Mo. App. 133).

As said by our Supreme Court in St. Louis v. Dreisoerner, 243 Mo. 217, 147 S. W. 998:

> "* * It is the settled law that a municipal corporation 'has no power by ordinance to declare that to be a nuisance which is not so in fact, or to suppress in part or in toto any business within its limits which is not a nuisance per se.' (St. Louis Gunning Co. v. St. Louis, 235 Mo. l. c. 147, et cases cited.) The clause of the ordinance upon which the information against defendant was framed refers to a calling which is not a nuisance per se, nor had it become such as carried on by defendant. Hence the city of St. Louis had no power under its charter to prohibit or abate it. It was a gainful occupation which the defendant was lawfully entitled to pursue in the manner which the evidence shows. The city had no specific power under its charter to regulate it, nor

> any authority so to do under the general welfare clause or as a police regulation.* * * "

To the same effect is Lux v. Milwaukee Mechanics Insurance Company, supra.

Therefore, under the rulings in this State, we may look to the thing which is declared to be a nuisance to determine if it is in fact such.

In so far as can be learned the appellate courts in this state have never passed upon the validity of ordinances of the type here involved and such ordinances have not been directly passed upon by the Supreme Court of our Nation. One must, therefore, consult the decisions of other forums for enlightment.

The same or similar ordinances have been passed upon by courts of last resort of other states and federal, circuit and district courts but with the unfortunate result of a direct conflict upon the subject and based upon diversified reasoning. As a consequence two lines of authority exist: First, wherein the ordinance is upheld as represented by its leader, Town of Green River v. Fuller Brush Company, 65 Fed. (2d) 112, 88 A. L. R. 177, a decision of the Tenth Circuit Court of Appeals; and, second, wherein the ordinance is held bad and represented by Prior v. White, a decision of the Supreme Court of Florida and reported in 180 So. 347, 116 A. L. R. 1176.

In the Green River case the ordinance involved is hereinbefore set out and the court stated that it was not doubted or questioned that the state had given the town, by statute, power to declare what shall constitute a nuisance and to abate and prevent the same and to inflict punishment on violators and said, l.c. 114:

> "* * * We think no distinction materially affecting the inquiry be-

tween solicitors and the others named in the ordinance can be found when its purpose and the annoyance which it was intended to prevent are borne in mind. We must therefore disagree with the learned District Judge in his conclusion that the ordinance was arbitrary and unreasonable.

"It has been uniformly held that while legislative authority may not arbitrarily interfere with private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law making power, and if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially declared to be in contravention of constitutional right.
* * * *

* * * *

"We therefore conclude that the ordinance is an appropriate exercise of the police power.

"We are also of opinion that the ordinance and its enforcement would not encroach directly or indirectly on appellee's constitutional rights, nor interfere with interstate commerce. It does not purport to interfere in any respect with appellee's right or privilege of selling and transporting its wares in interstate commerce. It is free to carry on a business of that sort except to solicit orders in the

> manner specified in the ordinance, and obviously it could do so in many ways other than imposing itself upon and disturbing the residents of the town as prohibited by the ordinance. Public notice of the presence of its agents in the town for the purpose of taking orders for appellee's goods could be given stating when and where such agents could be found, samples of its wares seen, and their use explained and demonstrated, and orders taken. * * * * * * * "

It will be noted that this decision assumes that the actions of the canvassers constitute a nuisance but makes no distinction between a common or public nuisance and a private nuisance.

This same ordinance was later considered by the Wyoming Supreme Court in Green River v. Bunger, 50 Wyo. 52, 58 Pac. (2d) 456, in that case the Court reiterated the conclusion that no Federal constitutional provision was violated, and held that there was likewise no violation of state constitutional provisions declaring that "in their inherent right to life, liberty, and the pursuit of happiness all members of the human race are equal," and "absolute (and) arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority." The court expressed the opinion that the practice of persons falling within the prohibition of the ordinance, of first calling at private residences to obtain an invitation and then making a second call to exhibit their merchandise, pursuant thereto, was a palpable evasion of the ordinance.

In the case of McCormick v. The City of Montrose, 99 P. (2d) 969, the Supreme Court of Colorado had under consideration an ordinance practically identical with the Green River Ordinance. And that court held an implied request or invitation to take the case out of the ordinance was not tenable, and said: (971)

> "* * * The ordinance was passed as a police regulation. It announced the public policy of Montrose to be to penalize soliciting in residences unless in response to request or invitation of the owners or occupants thereof. What defendant's employer, the Real Silk Hosiery Mills, had done lawfully as a practice before the ordinance was passed could not be construed as an implied request or invitation by the householders to continue such practice after they, through their city council, had passed an ordinance penalizing the practice. If solicitation had been carried on by defendant, or by the company through other agents, after the ordinance was passed without first securing a request or invitation, this was purely by sufferance of those who might have enforced it, and created no right in defendant or the company to continue to violate its provisions with impunity until notified that they might no longer do so. * * * * * * * * * * * *"

The court also pointed out that under the Statutes of Colorado the city had the right to license, tax, regulate, suppress and prohibit hucksters, peddlers, pawnbrokers, etc., and said, l. c. 972:

> "* * * * * Defendant's contention is in effect that since it is not a nuisance in fact it cannot be such in law and that if it is a nuisance in fact it is a private and not a

public nuisance and that the city can declare conduct to be a nuisance and provide for its suppression only if it amounts to a public nuisance. If the conduct is a nuisance in fact and public in character it follows even under the theory of defendant, that the city, in view of the statute, had power to pass the ordinance. Sec. 10, c. 163, '35 C.S.A., supra. However, the issue of whether the ordinance may be upheld or not need not be decided by determining, and we do not determine, whether the conduct inhibited by it is technically a nuisance or whether, if it is not, it becomes such by the legislative fiat of the city council that it is a nuisance. The Twentieth Amendment to the Constitution gives home rule cities the right to exercise police power as to local matters, possibly subject to the limitation that they may not exercise police power in such manner as to interfere with the state's exercise of its police power where it has elected to deal with the same subject matter. Denver v. Tihen, 77 Colo. 212, 235 P. 777. But no conflict is here involved, and we need not and do not concern ourselves either with the existence of a limitation or its extent, if there is one. Whether there shall or shall not be soliciting in or upon private residences within the city, at least until the state has seen fit to exercise its police powers with reference to it, is a matter of local concern only. If the city has the power to penalize the conduct declared by the ordinance to be a nuisance, we think that it is immaterial that it provided that such conduct shall first be given the name of nuisance, which defendant contends is not,

> and which may not be in fact, a fitting name. The real question is whether the city has the power to punish the proscribed conduct, not whether it has the right to name it."

And also,l. c. 974, the court said:

> "* * * * Defendant concedes that, there being no prohibitory ordinance, the consent may be withdrawn by placing on the premises 'the customary warning sign "no solicitors allowed."' Conversely, there being such an ordinance, a request and invitation might effectively be given by displaying a sign, 'Solicitors Welcome.' * * * *"

The Court of Appeals of Illinois in Saxton v. City of Peoria, 75 Ill. App. 397, upheld an ordinance making it subject to a fine for a person to enter any private premises against the consent of the owner or occupant thereof.

On the other hand in the case of Prior v. White, supra, the Supreme Court of Florida held an ordinance reading as follows (l. c. 1178):

> "'Section 1. The practice of being in and upon private residences in the City of New Smyrna, Florida, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares, and merchandise and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared a nuisance and punishable as such nuisance as a misdemeanor.'"

an unjustifiable exercise of the police powers of the city and depriving persons engaged in such business of their constitutional rights, and the court said (l. c. 1185):

> "It is contended by the respondent that the general 'police powers' conferred upon the municipality by the Legislature are sufficient to justify the passage of such an ordinance."

And further said (l. c. 1187, 1188 and 1189):

> "Unless the householder manifests externally in some way his wish to remain unmolested by the visits of solicitors, it would seem that the solicitor may take custom and usage as implying consent to call where such custom and usage exist. 31 Michigan Law Review, 543. Invitation may be implied from custom, usage or conduct. Lawrence v. Kaul Lumber Company, 171 Ala. 300, 55 So. 111. And it has been held that a license may be implied to enter the house of another, at usual and reasonable hours, and in a customary manner for any of the common purposes of life. Lakin v. Ames, 10 Cush., Mass., 198. See, also, section 167 of Restatement of Torts.
>
> *
>
> "Tested by this rule, the act sought to be prohibited by the ordinance is manifestly not a public nuisance and therefore may not be punished as a crime or misdemeanor. It is an old common-law principle that an indictment will lie only for a public nuisance, not for a private nuisance. See, in this connection, Pennsylvania Coal Company v. Mahon, 260 U. S. 393, 43 S. Ct. 158,

67 L. ed. 322, 28 A. L. R. 1321, and
46 C. J. 648; 2 McQuillin, section 677.

* * * * * * * * * * * * * * * * * * * *

"It appears from the evidence in this case that the house to house solicitation of business, such as was engaged in by this petitioner, constitutes what has become an ordinary, usual, and lawful method of doing business, and our conclusion is that a municipality cannot, by an attempted exercise of its general police powers, prohibit such method of doing business, except perhaps as to householders who have in some manner indicated that solicitation of business, or certain designated types of business, at their homes, is not allowed.

* * * * * * * * * * * * * * * * * * * *

"For the reasons above pointed out, we hold that, as applied to this petitioner, and the act or practice of soliciting orders for the sale of goods, wares, and merchandise, the ordinance is unreasonable and invades the petitioner's constitutional rights. * * * * * * * * * * * * * * * *"

Virginia, Maryland, South Carolina, Oklahoma and Nebraska, in addition to Florida, hold that the Green River ordinance is invalid and assign in the main as their reason for so holding that the municipality has no power to prohibit as a public nuisance the uninvited entrance upon private property by canvassers and peddlers because such entrance, if a nuisance, is not a public nuisance in fact. See Prior v. White, 180 So. 347, 132 Fla. 1; White v. Town of Culpeper, 172 Va. 630, 1. S. E. (2d) 269; Jewel Tea Co. v. Bel Air, 172 Md. 536, 192 A. 417; City of Orangeburg v. Farmer, 181 S. C. 143, 186 S. W. 783; Jewel Tea Company v. City of Geneva, 291 N. W.

(Nebr.) 664, and City of McAlester v. Grand Union Tea Co., (Okla) 98 P. (2d) 924. In the last case it is said (l. c. 926):

> "The courts have frequently held a municipality without authority under a general grant of police power to make penal a private trespass."

While in the City of Geneva case the Supreme Court of Nebraska said (l. c. 670):

> "A municipality has no power, under its general authority, to prohibit as a nuisance an occupation which is not a nuisance in fact. Ex parte Harris, 97 Tex. Cr. R. 399, 261 S. W. 1050, 32 A. L. R. 1356.
>
> "Nor can the police power be exerted arbitrarily to interfere with private business, or to prohibit lawful occupations, or to impose unreasonable or unnecessary restrictions upon them under the guise of protection of the public. Corporation of Toronto v. Virgo, 73 Law Times Rep. 449."

It is interesting to note the Green River case did not take into account the case of Real Silk Hosiery Mills v. Richmond, 298 Fed. 126, the decision in Williams v. Arkansas, 217 U. S. 79, 54 L. Ed. 675, and the opinion in the case of Lovell v. Griffin, 303 U. S. 343, 82 L. Ed. 949.

In the Richmond case, supra, the District Court considered an ordinance preventing trespass, annoyances and disorder of solicitors who rang doorbells or knocked at doors of dwelling places bearing a sign "No peddlers," and said:

> "Where the household permits solicitors, the city cannot forbid."

The opinion also held that the application of the ordinance was an unwarranted interference with interstate commerce and violated the due process of law provision of the Constitution.

In Williams v. Arkansas, 217 U. S. 79, a statute of the State of Arkansas prohibited soliciting business or patronage on railway trains or premises of common carriers for hotels, physicians and bathhouses, and this statute was held constitutional by the United States Supreme Court and not contrary to the due process of law but a valid exercise of the police powers of the state. It is possible that this decision is distinguishable from most similar city ordinance cases upon the theory that the state has the plenary power and absolute power to legislate on certain subjects but the authority of a municipal corporation is restricted to that delegated to it by the Legislature.

The Supreme Court of the United States in Lovell v. Griffin, 303 U. S. 343, 82 L. Ed. 949, held, where a member of the Kingdom of Jehovah was arrested under the terms of an ordinance that prohibited the distribution of printed matter by sale or gratuitously without a permit of the city manager, such ordinance unconstitutional, and said:

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. * * * *
>
> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. * * * * * *

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. * * * * *"

A state statute that required one to secure permission from the secretary of the welfare commission before soliciting for religious, charitable and philanthropic causes, and left the determination of the granting of a permission to the secretary was held unconstitutional in the recent case of Cantwell v. Connecticut by the United States Supreme Court on May 20, 1940 (84 L. Ed. 836). The defendant, a member of "Jehovah's Witnesses," who had not secured a permit met two persons on the street and played a phonograph record to them, and it was held (l. c. 839):

> "* * * * * No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guaranty. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.
>
> "* * * * * Here we have a situation analogous to a conviction under a

> statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.
>
> *
>
> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

Conclusion

It is the opinion of this Department that an ordinance that declares the uninvited entrance upon private property for the purpose of soliciting or canvassing to be a nuisance is under the greater weight of authority, and we believe the better and more sound rule, unconstitutional and void. In view of the attitude of the Missouri Appellate Courts, we believe that conclusion would be reached by our courts of last

resort if the question were presented to them.

Respectfully submitted,

VANE THURLO
Assistant Attorney-General

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

VT-AO'K/RW

TAXATION: TOWNSHIP COLLECTORS' DUTIES: DELINQUENT TAXES:

The duties of township collectors in regard to collecting current and delinquent personal taxes.

January 23, 1940

1-24

FILED

14

Honorable Henry Cain
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following statement:

> "The Township Collectors of Stoddard County have asked me to obtain an opinion from your office in regard to their official and detailed duties in relation to the collection of personal taxes up to the time of March 1st of each year, when said delinquent taxes, if any, are turned over to the ex-officio county collector.
>
> "Furthermore, we would appreciate having your opinion in regard to Sections 12332, 12333 and 12334, R. S. Mo. 1929, in relation to the duties and procedure of township collectors in the collection of personal taxes, if any."

On the question of the duties of the township collectors in regard to the collection of personal taxes up to the time such township collector makes his delinquent report, we find the following sections are pertinent and set out such duties and the procedure of such collectors in respect thereto:

Section 12320, R. S. Missouri 1929, is as follows:

"The county clerk shall cause a copy of the assessment roll of each township in their respective counties, with the taxes extended thereon, to be delivered to the collector of such township, on or before the day in each year, as fixed by law, when taxes become due."

Section 12321, R. S. Missouri 1929, is as follows:

"To each assessment roll a warrant under the hand of the county clerk and seal of the court shall be annexed, commanding such collector to collect from the several persons named in the assessment roll the several sums mentioned in the last columns of such roll, opposite their respective names; the warrant shall direct the collector, out of the moneys collected, after deducting the compensation to which he may be lawfully entitled, to pay over to the county treasurer the state and county tax collected by him. He shall pay over to the township treasurer all school moneys collected by him, and all moneys collected for township expenses, and all moneys collected for road and bridge purposes."

Section 12322, R. S. Missouri 1929, is as follows:

"In all cases the warrant shall authorize the collector, in case any person named in such assessment roll shall neglect or refuse to pay his tax, to levy the same by distress and sale of the goods and chattels of such person, and it shall require all payments therein specified to be made by the day fixed by law for the

> delivery of the tax book to the county treasurer. The county clerk shall notify the county treasurer that said books are completed, and shall furnish the treasurer with a statement setting forth the name of each collector, the amount of money to be collected and paid over for each purpose for which the tax is levied in each of the several townships."

Section 9915, R. S. Missouri 1929, provides as follows:

> "The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by

> deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent: Provided further, that when any person owing personal tax removes from one county in this state to another, it shall be the duty of the county collector (or township collector as the case may be) of the county from which such person shall move, to send a tax bill to the sheriff of the county into which such person may be found, and on receipt of the same by said sheriff, it shall be his duty to proceed to collect said tax bill in like manner as provided by law for the collection of personal tax, for which he shall be allowed the same compensation as provided by law in the collection of executions. It shall be the duty of the sheriff in such case to make due return to the collector of the county from whence said tax bill was issued, with the money collected thereon."

The township collector's duties and powers are stated in the foregoing sections and he may exercise them thereunder until he has turned the delinquent list over and made his settlement as is provided by Section 12323, R. S. Missouri 1929, which is as follows:

> "The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state,

county, school and township taxes and produce receipts from the proper officers for all school and township taxes collected by him, less his commission on same, at which time he shall pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, and shall make oath before said court that he has exhausted all the remedies required by law for the collection of said taxes. He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and it shall be the duty of said court to cause the clerk thereof to notify the state auditor and the prosecuting attorney of said county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the state auditor and the prosecuting attorney shall proceed against such collector in the manner provided in section 12337 of these statutes, and such collector shall be liable to the penalties in said section imposed."

It will be noted that this section also requires the township collector to make a final settlement with the township board in the township in which he is collector on or before the twentieth day of March. This indicates that the township collector's duties as to collection of taxes cease after he makes his settlement with the county court as is provided by said Section 12323.

Under said Section 9915, however, it will be noted that the collector of taxes is authorized to seize and sell property for taxes after October the first, so from this section the township collector, bewteen October the first and March the first, the time for making his settlement, as is provided by said Section 12323, has power to seize and sell the goods and chattels of persons liable for taxes in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law.

In respect to the duties of the county treasurer, who is ex-officio collector, in counties under township organization, Section 12312, R. S. Missouri 1929, provides as follows:

> "The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. The ex officio collector shall, at the time of making his annual settlement in each year, deposit the tax books returned by the township collectors in the office of the county clerk, and within thirty days thereafter the

> clerk chall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of land and town lots which have been returned delinquent by said collectors, and return said list to the ex officio collector, taking his receipt therefor."

By this section it appears that the lawmakers intended that the township collector, when he makes his settlement as is provided by said Section 12323, shall deposit the tax books with the ex-officio collector of the county and then when the ex-officio collector of the county makes his annual settlement, he deposits these books with the county clerk and within thirty days thereafter said clerk makes in a book called the "back tax book" a correct list in numerical order of all tracts of lands and lots which have been returned delinquent by said collectors and then the county clerk returns this corrected list to the ex-officio collector from which list the ex-officio collector performs his duties of collecting taxes as is provided by Sections 12332, 12333 and 12334. That being the case, it does not seem that the township collectors, after they have made their settlement as is provided by said Section 12233, have any further duties to perform in connection with collecting taxes, and that the duties of collecting delinquent taxes, after such settlements are made, are imposed on the ex-officio township collector.

CONCLUSION.

From the foregoing it is the opinion of this department that township collectors, between October the first and March the first of each particular year, shall diligently endeavor to use all lawful means to collect all taxes in which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, between October the first and the following March, when such collector makes his settlement.

We are further of the opinion that the duties of the township collector, in regard to collecting taxes, cease after he makes his settlement under Section 12233, and that the ex-officio collector then performs all of the duties and acts necessary in collecting delinquent taxes as is provided under Sections 12332, 12333 and 12334.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

RECORDER OF DEEDS: Recorder may appoint deputies with consent of the County Court and may set a reasonable salary without consent of the County Court. Recorder should account for and turn into the County Treasurer all surplus fees at the end of each year.

March 4, 1940

8-13

FILED 15

Mr. Marvin S. Carmichael
Associate Judge, County Court
Nodaway County
Maryville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 24th, 1940, which reads as follows:

"I would appreciate your opinion in regard to excess fees of the County Recorder and the Recorder's deputies' salary.

"The Recorder in our County collected for the year 1939, $9,680.05. Out of this amount $4,000.00 was retained as the Recorder's salary and $2,721.00 was paid out for deputy hire, leaving excess fees in the amount of $2,959.05 to be turned over to the county. However, to date, only $200.00 has been turned over to the County Treasurer, leaving $2,759.05 unpaid. When should these excess fees be turned over to the county, each year when settlement is made with the County Court or at the end of the four year term?

"The Recorder's first deputy's salary was increased from $100.00 to $150.00 for the year 1939 without the consent of the County Court. Does the County

> Court have the authority to set the deputy's salary and would it be possible to collect this excess deputy salary in the amount of $600.00?"

Section 13, Article 9, Constitution of the State of Missouri, reads as follows:

> "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

Under the above section, it will be noticed that every officer, which includes the Recorder of Deeds, shall make a return quarterly to the county court of all fees by him received. This section does not state that the Recorder of Deeds turn in the fees quarterly, but only states making return quarterly.

Section 11568 R. S. Missouri, 1929, reads as follows:

> "The recorder of each county in which the offices of recorder of deeds and

> clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

Under the above section the Recorder of Deeds of each county shall pay in to the county treasury every year surplus fees. This section is not ambiguous and the plain english language means that it is mandatory for the Recorder of Deeds to pay in to the county treasury all surplus fees to form a part of the jury fund of the county.

In view of the above section it is the opinion of this department that the Recorder of Deeds of Nodaway County shall, at the end of each year, pay in to the county treasury all surplus fees which have accrued after he has deducted his own salary of $4,000.00, and for salaries of deputies and assistants in his office.

Section 11542 R. S. Missouri, 1929, reads as follows:

> "In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or

> more deputies, to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

Under the above section the recorder of deeds may appoint in writing one or more deputies to be approved by the county court of the county. The above section does not say that the county court in its discretion may set the salary of the deputy. It has been held that the recorder of deeds may set a reasonable salary for deputies appointed by him.

In the case of State ex rel v. King, 136 Mo. 309, l.c. 318, the court said:

> "The constitution, while placing a limit upon the amount of fees ministerial officers of a county are allowed to retain, makes such amount 'exclusive of the salaries actually paid to his necessary deputies.' Section 13, article 9. The statute which was in force when the constitution was adopted limits the fees a recorder is entitled to retain to $4,000 per year, and provides that all fees received by him over and above that amount 'for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants

in his office as the county court may deem necessary, shall be paid into the county treasury.'

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?

"The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute can not be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then, the word 'may' can not be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' Steines v. Franklin Co., 48 Mo. 178, quoting from Newburgh Turnpike Co. v. Miller, 5 Johns. Chy. 113.

"There can be no doubt that the public interest demands that the work required of a recorder should be done promptly, carefully, and well. A public officer is, by right, entitled to compensation for the labor performed, and it should also be measured to some extent by the responsibilities assumed. The statute regulates the amount of the fees the recorder is entitled to collect, and the presumption is that he fairly earns what he is allowed to charge. Four thousand dollars was fixed as the amount the recorder was capable of earning at the established charges; and, when the fees for work required to be done exceed that sum, it is a fair presumption that assistance would be necessary. If necessary, the constitution and statute clearly intend that assistants should be employed and paid.

"In construing a statute which provided that when a county officer receiving a salary is compelled, by pressure of business to employ a deputy, 'the county court may make a reasonable allowance to the deputy,' the court held that the county must pay a reasonable compensation for the necessary service rendered, and that payment was not discretionary with the county court. Bradley v. Jefferson Co., 4 G. Greene, 300. See, also, Washington Co v. Jones, 45 Iowa, 261.

"We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court.
* * * \

In view of the holding in the above case, it is the opinion of this department that the recorder of deeds may set the salary of his deputy, if within reason, without the consent of the county court, and it is the opinion of this department that, unless it would be considered unreasonable, the county court cannot collect the $600.00 which it considers an overpayment of the first deputy's salary.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

COUNTIES: Construction of Section 2922 R. S. Mo. 1929, authorizing issuance of bonds for funding prior county indebtedness.

May 15, 1940

5-77

FILED
15

Mr. Omer Casey
Treasurer
Cedar County
Stockton, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department, which said request reads as follows:

> "I am writing you for an opinion which may be entirely out of order on my part. We have issued in 1936 about $6000.00 worth of warrants for which there are no funds to pay and only about $500.00 back taxes. In checking the county budget for that year I find that these warrants were issued in the bounds of the budget which was approved by the State Auditor's office, but there were some $6800.00 of anticipated revenue that never was collected. This revenue was supposed to have been earned by a county road grader charging for work done in road districts. In that case can the holders of the warrants file suit and collect for such warrants and if so what steps for raising funds could be taken?"

In looking over our files I note that we prepared an opinion for you under date of September 28, 1939. From reading the opinion we presume it touched on the situation that you refer to in your opinion request. We presume that which you have in mind is funding bonds and we call your attention to Section 2922 R. S. Missouri, 1929, which reads as follows:

> "County and municipal authorities are hereby authorized to submit to the qualified voters of any county, city or village, at any special election held for that purpose, or at any primary or general election held under the laws of this state, a proposition whether any judgment indebtedness of such county or municipality shall be funded; and if two-thirds or more of the qualified voters of such county or municipality voting on the proposition shall assent thereto, such county or municipality shall be authorized to borrow upon its credit the amount of money authorized to be borrowed, and to issue, negotiate, and sell coupon funding bonds of such county or municipality, maturing serially, in not more than twenty years after their date in annual amounts as nearly equal as may be practicable, payable to bearer, with interest payable semi-annually, at a rate not exceeding six per centum per annum; and from the proceeds of the sale or sales thereof to satisfy and discharge such judgment indebtedness. The assent of two-thirds or more of the said qualified voters to such proposition and the issuance of such funding bonds under this section shall be deemed and held by all courts in this state to be, to all intents and purposes, the incurring of a new indebtedness; and thereafter no question shall ever be raised in any

court as to the validity of such indebtedness, except questions of constitutional limitation of indebtedness. And such funding bonds shall not be exchanged or delivered in payment of such judgment indebtedness nor any part thereof. The provisions of this section shall not be deemed to be repugnant to nor inconsistent with section 2892, Art. 4, Chap. 15, R. S. 1929; but the power and authority hereby conferred shall be deemed to be cumulative thereof."

In the case of State ex rel. Clark County v. Hackman, State Auditor, 218 S. W. 318, the court, at l. c. 319, had this to say:

"The counties of the state, in anticipation of their yearly revenue, issue warrants against such revenue. The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This on the theory that the warrants represent valid contracts made during the year. By valid contracts we mean contracts within the anticipated revenue of the year. Thus in Trask v. Livingston County, 210 Mo. loc. cit. 594, 109 S. W. 659, 37 L.R.A. (N.S.) 1045, it is said:

"It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the ex-

tent of the year's income in which the debt is contracted or created and prohibits the anticipation of the revenues of any future year.' "

On page 324, the court said:

"Whilst section 12, art. 10, inhibits counties from contracting debts 'exceeding in any year the income and revenue provided for such year,' yet in addition to this inhibition is a grant of authority to contract in excess of the yearly income and revenue, with 'the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' If this is not a grant of the authority, there is no such authority. Without this grant the Legislature would be powerless, and no law passed by the Legislature could give it. This because of the broad and positive restriction in the first paragraph, so that, for the ordinary and usual county public purposes, the real grant to hold an election comes from the Constitution. And where no machinery has been provided for such an election, it is sufficient if there is used the ordinary and usual machinery provided for obtaining the expression of the votes upon the question. In this case the Legislature in 1919 has specifically provided the method, (see section 2922, supra), which is not materially different from the one used here, but if our views of the situation are correct, there would be a useless expenditure of money to require a new vote under the act of 1919. We think there was authority for the election without this act, and

that the act was passed to make assurance doubly sure."

In the case of State ex rel. Jackson County et al. v. Waltner, Judge, et al., 100 S. W. (2d) 272, l. c. 276, the court had this to say:

"Section 2922 authorizes counties to submit to vote at a special election a proposition to issue funding bonds which must receive the assent of two-thirds or more of the qualified voters voting on the proposition. Section 2926 provides that whereever and whenever any county, etc., shall have issued bonds under and by authority of any provision of the Constitution of the state of Missouri or any law enacted in pursuance thereof, such county may file in the circuit court of the county having jurisdiction of the subject-matter a petition for a pro forma decree authorizing the issuance of such bonds. Section 2927 provides for the publication of notice of such proceeding and permits any taxpaying citizen to file an intervening petition contesting the validity of such bonds. Section 2928 provides that upon a hearing, the court shall carefully investigate the record concerning such bond issue, together with all evidence and proofs submitted at such hearing, and if the court be of the opinion that said bonds are legal and that bonds are legal and that the laws of the state have been complied with, then such court shall make an order and decree adjudging such bonds to be valid."

In the case of State ex rel. Gilpin, et al. v. Smith, 96 S. W. (2d) 40, l. c. 42, the court had this to say:

"We think that these bonds should be certified and registered by the respondent.

"It will be unnecessary for us to pass on the relators' contention that sections 2922 and 2923, R. S. Mo. 1929 (Mo. Stat. Ann. Secs. 2922, 2923, p. 765), authorizes Buchanan county to issue these bonds in question. Section 2922, supra, authorizes any county to submit to its qualified voters the proposition of issuing bonds of the county for the purpose of providing funds to satisfy and discharge any 'judgment indebtedness' of the county."

We are enclosing an opinion rendered on February 21, 1939, to Honorable Marvin S. Carmichael, Associate Judge of Nodaway County Court, Marysville, Missouri, which opinion explains and holds how unpaid county indebtedness may be paid from surplus revenues, which opinion is herewith enclosed for the purpose of your convenience.

CONCLUSION

If the method explained in the enclosed opinion is not adequate, then we conclude that after judgment has once been obtained on the warrants referred to in your opinion request, a special election could be held in compliance with section 2922, and other sections in Article 7, Chapter 15, R. S. Mo. 1929. If the requisite vote was procured, funding bonds could be issued and sold to satisfy whatever judgments had been obtained on the warrants, and this

would constitute a further method of collecting on the past indebtedness of the county referred to in your opinion request.

Respectfully submitted,

B. RICHARDS CREECH,
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC/rv

Enc.

MUNICIPAL CORPORATIONS: Ordinance may be repealed when same does not interfere with vested rights.

November 22, 1940

12-9

FILED
15

Mr. A. J. Caywood, Publisher
The Laclede Blade
Laclede, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion under date of October 23d, as follows:

> "In behalf of a number of citizens of our town as well as myself I desire an opinion from your office on the question of whether or not the City Council has the power to pass an ordinance repealing a former ordinance for the issuing of bonds, which said ordinance was ratified by the voters but the bonds never having been issued.
>
> "The City of Laclede, acting through its City Council, passed an ordinance in 1932 providing for a special election for the purpose of submitting to the legal voters of the said city a proposition to issue bonds in the amount of $12,000 for the purpose of providing funds for the building of an electric light system. The election was held May 3, 1932 and the proposition was ratified. Later injunction proceedings were filed by a tax paying citizen, Mr. E. B. Allen, and a temporary injunction was granted restraining the auditor from registering these bonds. Up to this present date nothing has been done toward the issuing of the bonds and since the

voting of the said bonds conditions have changed and many of the citizens now feel that it is to the interest of our community to not issue the said bonds. In the first place the amount of bonds voted was not half enough to accomplish the original purpose and, second, our town has built a new school building and has graveled its streets, incurring heavy bonded indebtedness for said improvements and, too, on account of general conditions the citizens of our community wish to cancel this issue of bonds above mentioned. Also about 1933 a part of the special tax was collected on account of the issuance of these bonds which said tax amounts to about $900 and is impounded in one of our county banks. The taxpayers are very anxious to have this money re-distributed to the persons who paid it in.

"The City Council is also interested in canceling the bonds but is not certain whether it has the power to do so. In 1934 Mr. T. P. Burns, an attorney living in this county, gave an opinion to the City Council stating that the Council has the right to pass an ordinance repealing the said bonds and thereby declaring the whole matter at an end. I am enclosing herewith a copy of Mr. Burns' opinion and would like to have you check it over and tell me whether or not we would be performing according to the law if the City Council should pass an ordinance repealing these bonds.

"Our citizens will appreciate it very much if you will let us have your opinion in this matter in order that we may be guided by same."

The City of Laclede having a population of 644 inhabitants according to the official 1930 United States Census, we presume the same comes within the classification of cities of the fourth class. Section 6093, R. S. Mo. 1929.

Section 7030, R. S. Mo. 1929, authorizes the issuance of bonds by the board of aldermen in cities of the fourth class for electric light plants, providing assent therefor is given by two-thirds majority of the electors of the city. Said section provides in part as follows:

> "Bonds may be issued for * * * light plants * * *. The board of aldermen shall have power to borrow money and issue bonds for the payment thereof, within the limits prescribed by the Constitution, for the purpose of erecting * * * electric light works, * * * or acquire the same by purchase; * * *but bonds for the purpose aforesaid shall not be issued until two-thirds (2/3) of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929."

It is readily evident from a reading of the above section that the power to borrow money and issue bonds for the construction of an electric light system is vested in the board of aldermen, and that its authority is expressed by the enactment of an ordinance. The electors may acquiesce or refuse to approve the actions of the board, in which case the board could not borrow the money or issue the bonds, but the power of the board as expressed by the ordinance still remains.

McQuillan on Municipal Corporation, Vol. 2, Section 871, page 1127, in discussing the power to repeal ordinances, states as follows:

> "Specific grant of power to amend or repeal ordinances is not necessary in view of the general rule that power to enact them, unless restricted, implies power to repeal them. * * * Generally speaking, all ordinances are subject to repeal. * * * In the absence therefore of a valid provision to the contrary, the council of a municipal corporation having the authority to legislate on any given subject, may exercise that authority at will by enacting or repealing an ordinance in relation to such subject matter. * * * The efficacy of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it."

In the case of the City of Kansas v. White, 69 Mo. 26, the court said:

> "By the charter, the city had authority to pass ordinances to suppress gaming. It, of course, had authority to repeal them when passed."

43 C. J., Sec. 887, p. 562, in discussing the same subject, states that:

> "Subject to limitations hereinafter considered, the power of a municipal council to repeal ordinances is by necessary implication as broad as the power to enact them, * * * * * * * * "

One of the limitations of this power to repeal is where the effect of such repeal would be to interfere with vested rights. 43 C. J., Sec. 888, p. 563, declares the rule as follows:

> "The power to repeal ordinances cannot be exercised by a municipality where the effect of such repeal would be to interfere with vested rights acquired under the ordinance which it

> is sought to repeal. But an ordinance may be repealed at any time before compliance with the steps necessary to render it effective, because in such case no one is deprived of any vested right * * * *"

You state that the bonds were never registered by reason of a temporary injunction having been granted restraining the auditor, and that up to the present time nothing has been done towards the issuance of the bonds. Certainly under the circumstances no one would be deprived of their vested rights by repeal of the ordinance.

In the case of State v. Hackmann, 199 S. W. 990, bonds had been issued in accordance with a statute which was repealed by an act approved April, 1917. The preliminary steps necessary to authorize the issuance of the bonds in conformity with the statute then in force had been complied with prior to its repeal but the bonds were not issued until April 29, 1917. In June, 1917, they were presented to the respondent for registration and were by him registered. Soon thereafter they were sold and paid for at their par value.

Afterwards, on June 10, 1917, the County Court called for the payment of all said bonds and in order to provide funds necessary to pay off and retire the same, prepared and executed refunding bonds. These refunding bonds were presented to the respondent, as Auditor of the State, in compliance with the requisites of the law and their registration was by him refused. This proceeding was in mandamus to require respondent as State Auditor to register the issue of refunding bonds of the county.

That the steps taken antecedent to the issue of the original bonds were in conformity with the law then in force, was conceded. Respondent, however, contended that the writ should not issue for the reason that the statute under which the original bonds were issued was expressly repealed before such bonds were actually issued, registered and negotiated.

The court in pointing out that there was no vested right impaired because it was dependent upon the contingency of the issuance of the bonds and the registration of same, said: (l. c. 991)

> "As a general rule, a statute expressly repealed is thereby abrogated, and all proceedings commenced thereunder which have not been consummated are rendered nugatory unless the repealing act is modified by a saving clause. Despite the fact that the courts with that conservative spirit which looks to permanence in the law, do not favor repeals (St. Louis v. Kellman, 235 Mo. 687, 139 S. W. 443), there is, except for modifications which may be effected by a saving clause, but one unqualified exception to the rule as above announced, and that is where a vested right is involved. * * * * * * * * * * However, the public nature and salutary character of these statutes will not alone suffice to render the rights they may confer, if not consummated, vested. By a 'vested right' we mean one which is absolute, complete, and unconditional (Orthwein v. Insurance Co., 261 Mo. loc. cit. 665, 170 S. W. 885), to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency (Young v. Jones, 180 Ill. loc. cit. 221, 54 N. E. 235; Bailey v. Phila., etc., R. R., 4 Har (Del.) loc. cit. 400, 44 Am. Dec. 593; Day v. Madden, 9 Colo. App. 464, 48 Pac. 1053; Royston v. Miller (C. C.) 76 Fed. loc. cit. 53). The facts do not sustain the conclusion that such a right exists here. While a right

> existed which had been partly executed at the time of the repeal of the statute, it was, at best, inchoate or initiatory in its nature; its consummation being dependent upon the contingency of the issuance of the bonds and the registration of same. This being the nature of the right, it does not furnish authority for the exercise of the mandatory power of the court."

You point out, however, that about 1933 a part of the special tax was collected on account of the issuance of these bonds, which is now impounded in one of your county banks. We assume by said statement that the funds are being held separate and apart in trust by the city for the taxpayers and can be returned to them. We know no reason why, under the circumstances, same cannot be immediately returned upon the repeal of the statute.

In the case of Loring v. City of St. Louis, 10 Mo. Ap. 414, the court in discussing the implied obligation on the part of a municipality to refund taxes where held in trust, said (l. c. 421):

> "Where a municipality has obtained money of another without authority of law, 'it is her duty,' says Chief Justice Field, in Argenti v. San Francisco, 16 Cal. 255, 'to refund it, not from any contract entered into by her on the subject, but from the natural obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or, if used by her, to render an equivalent to the true owner, from the like obligations. The law, which always intends justice, implies a promise."

43 C. J., Sec. 890, p. 564, in discussing methods of repealing ordinances, states that:

> "The simple and direct mode for effecting repeal of an ordinance is by a later ordinance passed by the common council, enacting that the former ordinance, describing it, is hereby repealed."

From the foregoing we are of the opinion that the Board of Aldermen of the City of Laclede may repeal an ordinance authorizing a bond issue for the building of an electric light system, which ordinance was ratified by the electorate, since to repeal same will not deprive anyone of their vested rights.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

COUNTY COURTS:
TOWNSHIP TREASURERS:
SETTLEMENTS:

County courts in counties under township organization may examine and approve settlements of township trustees.

January 5, 1940

1-6

FILED
16

Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit a request based upon the following statement:

> "The matter of Township Trustees making settlement has been brought to my attention for the following reason, the Township Organization has been adopted and the County is being operated under the Township Organization Law.
>
> "The County Court is and has for a long time been calling in the Trustees of each Township twice a year in order to go over a 'settlement' with the Township Trustee, and there being eighteen townships in the County it usually takes five or six days extra setting on the part of the County Court to 'check up' the settlement of the Township Trustees.
>
> "Section 12290 Revised Statutes of Missouri 1929, provides that the Township Trustee and Ex-Officio Treasurer shall make settlement annually between the 20th day of March and the 15th day of April with the County Clerk of all moneys received by him on account of schools, etc.

"Section 12292 provides that the Treasurer settle annually with the Township Board and account for all moneys, etc., and in the same Section provides that the Township Clerk shall on or before the 15th of July each year deliver to the County Clerk a certified copy of the settlement which shall constitute the required settlement by which the County Clerk shall make his annual settlement with the State Superintendent of Schools.

"These are the only two Sections that I am able to find on which the County Court may assume its right to call in these Township Trustees and make settlement.

"It appears that there has been quite a development along this line and I am enclosing a copy of the settlement used by the County Court, which you will notice goes into all the affairs of the Township.

"I would appreciate your valued advice on this matter as the so-called settlement by the County Court costs the County a considerable amount of money each year and if it is not authorized by law of course the County Court does not wish to assume an unauthorized act."

The township treasurer, in counties under township organization, Section 12292, R. S. Missouri 1929, is required to make settlements with the township board. This section provides as follows:

> "The township treasurer shall, annually, between the first day and the tenth day of July of each year, settle with the township board and account for all school moneys received, from whom and on what account, and the amount paid out for school purposes and for building purposes to the various school districts of the township. The township board shall examine the vouchers for such payments, and, if satisfied with the correctness thereof, shall certify the same, which certificate shall be prima facie a discharge of such liability of the treasurer for the funds expressed in the vouchers. The township clerk shall, on or before the fifteenth of July of each year, deliver to the county clerk a certified copy of said settlement, which shall constitute the required settlement by which the county clerk shall make his annual settlement with the state superintendent of public schools."

Under Section 12290, R. S. Missouri 1929, the township trustee is required to make a settlement with the county clerk for school funds. This section provides as follows:

> "He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; said book to be kept in such a manner as to show the amount of money in his hands belonging to each school district or fractional part

> in the township and the amount of road money belonging to the township. He shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within twenty days after the apportionment of the school funds to the school district, and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, and shall pay all warrants drawn on him by the board of school directors in his township out of the funds belonging to the district making the order, and he shall not pay any money out belonging to any other fund than that mentioned in the warrants, and he shall file with the township clerk on or before the day of the regular meeting of the township board in April a detailed statement of all money by him received and paid out, to whom and out of what fund, and the amount on hand, and at the expiration of his term of office he shall turn over to his successor all moneys, books and papers belonging to the office, and take duplicate receipts for the same, one to be filed with the township clerk, the other to be retained by himself."

It seems under the two foregoing sections that the lawmakers have set up a system for the accounting for and settlement by the township officers of the public moneys which come into their hands. Your request particularly applies to the question of whether or not the county court, after the proper officers have made

the settlements as is required by the two foregoing sections, would be authorized or required to meet and go over these settlements and finally approve them. It will be noted under said Section 12290 that the settlement provided therein is made with the clerk of the county court. Since this settlement pertains to matters in which the county, as a whole, is interested, then the county court, while it may not be required to examine and approve such settlements, yet under the Constitution and statutes which requires the county court to manage the general county business, might have authority to examine and approve them.

Under Section 36 of Article VI of the Constitution of Missouri it is provided as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

In State ex rel. Buckner v. McElroy, 309 Mo. at 595, the court, in speaking of jurisdiction of county courts in matters pertaining to the county, held that the "jurisdiction of county courts is fixed by the Constitution and the Legislature is without power to limit the powers thus conferred," so if said Sections 12290 and 12292 attempt to limit the constitutional powers of the county court in its jurisdiction to transact county business, then those sections would have to yield to the foregoing provisions of the Constitution.

Section 2078, R. S. Missouri 1929, provides as follows:

> "The said court shall have control and management of the property, real and personal, belonging

> to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

We think that school moneys would be considered as property belonging to the county generally to such an extent that the county court, in the exercise of its statutory and constitutional powers, would be authorized to exercise some jurisdiction over such moneys in determining whether or not they are being properly disbursed.

CONCLUSION.

From the foregoing it is the opinion of this department that even though the county court is not required under Sections 12290 and 12292, R. S. Missouri 1929, to examine and approve the settlements of township officers pertaining to school moneys, yet under the constitutional and statutory provisions cited above such courts, in the exercise of their constitutional and statutory duties, may, in their discretion, examine and approve such settlements of the township officers.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

TOWNSHIPS: Special election to vote bonds for purchasing land and erecting building.

3/8

March 7, 1940

FILED
16

Hon. G. R. Chamberlin,
Prosecuting Attorney,
Cass County,
Harrisonville, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of March 4th asking for an opinion upon the following matter:

"The County Court has made the inquiry as to whether or not a Township Board may vote a levy for the purpose of building a township hall.

In the case at hand what the Township proposes to do is to vote a levy for one year, which they deem will be sufficient to construct a modest township hall. The levy they have in mind is fifteen cents in excess of the levy allowed by Section 9875, Revised Statutes of Missouri, 1929.

The matter presents a sort of double question. First, that if such thing was possible, whether or not the election would be ordered by the Township Board or by the County Court as is provided in voting bonds for road purposes.

I am unable to find any Statute which allows a township to vote bonds or which sets out any manner of doing it,

therefore, I presume to indulge upon your good nature as to an opinion on the same."

Section 8 of Article IX of the Constitution authorizes the General Assembly to provide for township organization. Pursuant to this authorization Chapter 86 of the Revised Statutes of 1929, and amending acts, have been enacted. Section 12256, Article 2, Chapter 86 , enumerating the powers of townships, provides among other powers:

"Each township, as a body corporate, shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of this state; second, to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly; ******"

The case of State ex rel. Jordon v. Haines, 72 Mo. 377, upholds the right of a township to acquire and pay for a site and building for township purposes. This decision was based on the constitution then in force and the Acts of 1873, which contained a provision similar to that in Section 12256, pertaining to the purchasing and holding of real estate by townships.

Section 11, Article X of our present Constitution places a limit upon the power of taxation of municipal corporations named therein but contains the following provision:

"For the purpose of erecting public buildings in counties, cities, or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor."

Section 12 of Article X of the Constitution contains a limitation upon the powers to incur indebtedness and raise the rate of taxation by the vote of the people. The Supreme Court of Missouri in the case of St. Joseph Board of Public Schools v. Patten, et al., 62 Mo. 444, l.c. 449 and 50, in passing upon the question of the right of the St. Joseph Board of Public Schools to levy a tax in excess of the rate as restricted by Section 11 of the Constitution, said:

> "Any construction, which makes these constitutional restrictions dependent on legislative action, destroys their vitality. The legislature may not see proper to pass any laws affording an opportunity to the voters to increase the school tax to 100 per cent. in cities and towns, and 65 per cent. in county school districts; and, if it is conceded that the restriction to 4 mills on the dollar needs legislation to enforce it, because the process by which this rate of taxation may be increased does, then, in the absence of any legislation, there is no limit, and these provisions of the constitution are lifeless. After the 1st of July, 1877, the laws inconsistent with them are repealed; but, if no legislation occurs, and the position that legislation is needed to enforce the restriction is a correct one, then both the restriction and the proviso are inoperative, and the legislature may regulate the rate of taxation at their pleasure.
>
> The legislature already possessed the power of limiting taxation to the maximum adopted in the constitution; but it was not the object or intention of the framers of the constitution to leave these limits to legislative discretion; but to declare constitutional limits, which, until removed in the mode pointed out in the constitution, should prevail

on its adoption. If the legislature and the people desire to increase this rate, a mode is provided by which it may be done; but, until this is done, the constitutional limit prevails."

There has never been any method of procedure prescribed by the General Assembly to be used by townships for voting bonds for the purpose of acquiring real property and erecting buildings.

The election mentioned in your inquiry by which the township may vote bonds for road purposes is authorized by Section 23 of Article X of the Constitution and, pursuant to that authority the General Assembly has prescribed the method, Section 7960 and following Revised Statutes 1929.

Conclusion: It is the conclusion of this Department, that no method of procedure having been directed by the General Assembly a township cannot hold a special election for the purpose of voting bonds and erecting a building.

Respectfully submitted,

WOJ:CP

W. O. JACKSON,
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

MOTOR VEHICLES: Gas tax to be paid on gas sold to manufacturers under cost-plus contracts to U. S.
TAXATION: Government.

September 23, 1940

10-1

FILED
16

Honorable Roy H. Cherry
State Inspector of Oils
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 13, 1940, which is as follows:

"The Missouri Petroleum Industries Committee has requested an opinion from this department as to the taxability under state laws of sales of motor vehicle fuels to contractors for use in connection with the national defense work under cost-plus contracts with the federal government. I regard this question of such importance that I hesitate to issue a ruling without an opinion from the legal department of the state of Missouri.

"In their request to this department, the following questions were asked:

Question No. 1

Will the supplier of motor fuels to the purchasing contractor be justified in accepting, in lieu of your state gasoline tax, U. S. Form 1094 executed by the designated contracting officer of the U. S. Government named in each contract?

Note: The fuels are being sold to the contractor by the supplier for use by the contractor in the performance of work in accordance with the terms of the contract entered into by the contractor with the U. S. Government. It is understood the supplier will bill the contractor for the fuel and show on his bill for purposes of identification the 'government number' applied to each contract.

Question No. 2.

Since the contractor purchases the motor fuels for use in performance of the work specified in the contracts for which he bills the U. S. Government in accordance with the terms thereof, would not the transaction be tax exempt as a sale for the use of the United States, inasmuch as the fuel is actually used by the contractor in his performance of the terms of the contract?

"I am enclosing a copy of a ruling by the Bureau of Internal Revenue regarding the application of federal excise taxes to sales to contractors engaged in similar work."

In reaching a conclusion on these questions it is not necessary to set out the various acts of Congress authorizing the Navy and Army departments to purchase equipment and supplies on a cost-plus basis. It suffices to say that there are several acts designed to promote and provide for our national defense and all that we have consulted contain provisions for the letting of contracts on a cost-plus basis.

The nature of such a contract, as we understand it, is that the United States Government contracts with a private industry to manufacture needed materials agreeing to pay the

manufacturer thereof the actual cost of manufacture plus a fixed percentage of the actual cost as a profit. (Words & Phrases Perm. Ed. Vol. 9 p. 794).

Numerous manufacturers in Missouri who hold these contracts will, of course, use gasoline in completing their contracts and we are informed that in some instances the contracts require transportation of the manufactured products to a place of acceptance. This in some instances will be by motor vehicle. These items, if required, are considered as part of the cost to the manufacturer in completing his contract.

The question for determination appears to be: Are sales of gasoline to a manufacturer under contract to the United States on a cost-plus basis, sales for the exclusive use of the United States? (We assume the gasoline so purchased is used exclusively in completion of the government contracts.) If so, such sales are exempt from the two cents a gallon tax imposed on the sale of gasoline in this state.

The immunity of the United States Government from taxation by the state exists, in this case, not by reason of any act of Congress, but rather, due to the implied immunity resulting from the dual sovereignty of state and Nation. Allen v. Regents of University of Georgia 58 S. Ct. 980, 304 U. S. 439. We point this out because of the ruling of the United States Treasury Department attached to your opinion request. The Internal Revenue Code does not operate to create a tax exemption from state taxes. The act provides that "no tax under this chapter shall be imposed with respect to the sale of any article - (1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in this chapter; (2) for resale by the vendee for such use by his vendee, if such article is in due course so resold; (3) for the exclusive use of the United States, * * *." (26 USCA 3442). As will be noted this act only affects taxes imposed "under this chapter." (Chap. 29 Internal Revenue Code).

Thus, as above stated, the tax exemption of these manufacturers, if it exists at all, must arise from the "immunity implied from the dual sovereignty recognized by the Constitution," on the theory that sales of gasoline thus made are sales to the United States and cannot be taxed. In an opinion to you, dated March 8, 1939, we considered this im-

munity of the United States from the gasoline tax imposed under the laws of Missouri and concluded that such sales (those made to the United States for its exclusive use) were not subject to this tax and therefore we will not now re-examine that question. Neither is it necessary to do so because in our opinion the facts here do not bring these manufacturers into the immune class.

In the instant case the sales of gasoline are not made to the United States (or its instrumentality) for its exclusive use. The sales are made to a private manufacturer who is under contract to the United States Government to produce certain material. The only burden laid upon the United States is that the price it must pay for the manufactured product will be greater if the manufacturer must pay the tax on the gasoline he uses in compliance with his government contract.

In Helvering v. Gerhardt 58 S. Ct. 969, 304 U. S. 375, the whole question of implied immunity due to dual sovereignty was reexamined. The court in the course of that opinion said, l. c. S. Ct. 976:

> "The fact that the expenses of the state government might be lessened if all those who deal with it were tax exempt was not thought to be an adequate basis for tax immunity in Metcalf & Eddy v. Mitchell, * *."

In the footnote reference appended to this statement it is stated: "Upon full consideration, the same principle was recently applied in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318, although the limitation there was upon the immunity of the federal government."

In the Dravo Contracting Company case the court was considering whether or not a gross receipt tax on the contracting company was valid as against the contention that a burden was imposed on the United States Government. The gross receipts of the company arose from a contract the company had with the government to build a levee. (It does not appear if it was under a cost-plus contract). The court held said tax not to be a burden on the government saying at l. c. S. Ct. 219, 220:

"The case differs toto coelo from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government--as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government.

* *

"The contention ultimately rests upon the point that the tax increases the cost to the government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond and property taxes.'

"But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. * * * * *"

The case of Trinity Farm Construction Co. v. Grosjean, 291 U.S. 466, 78 L. Ed. 919, seems to be in complete analogy with the instant case, except it does not appear whether there was a cost-plus contract involved. In that case the construction company had contracted to build a levee for the United States. In the construction of the levee gasoline was used and a tax was demanded of the company. The company sought to escape the tax on the theory it placed a burden on the United States. The court ruled against this contention saying at l. c. 921:

> "If the payment of state taxes imposed on the property and operation of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct."

Thus we see that before such a contention will be sustained it must be made to appear that the burden upon the United States is substantial and direct. As pointed out it has been ruled that the mere fact the expenses of the government might be lessened if these manufacturers were tax exempt is not an adequate basis for applying the immunity due to dual sovereignty.

While none of the cases considered here make it clear what kind of contract the builders of these levees were working under, we do not think that the mere fact a cost-plus contract is involved can have any bearing on the law. This is just one of many methods that might have been used to determine what price the government would pay and what profit the manufacturer would receive. There could be nothing about such a contract that would warrant the construction that the manufacturer is an instrumentality of the government or that the government is the actual manufacturer of the material.

CONCLUSION

Therefore it is our opinion that sales of gasoline made to manufacturers who are producing materials for the United States government under cost-plus contracts are not exempt from the tax on said gasoline imposed by the laws of Missouri. We observe in this connection that the tax on all gasoline so sold, that is not used to propel motor vehicles on our highways, will be refunded anyway if proper claims are filed by the purchasers of said gasoline.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

Approved:

COVELL R. HEWITT
(Acting) Attorney General

LLB/rv

TAXATION AND REVENUE: A trustee appointed, under the provisions of Section 9953b, Laws of Missouri 1939, at page 851, may sell lands purchased at a third offering of delinquent tax lands under the provisions of Section 9953a, Senate Bill No. 311, Laws of Missouri 1939, only upon order of the County Court. Lands on which there were no bids at the offering provided in Section 9953a, supra, must be reoffered by the collector at least once every five years subsequent to the third offering to toll the statute of limitations.

February 19, 1940.

Mr. Paul J. Clay
Clerk of County Court
St. Francois County
Farmington, Missouri

2-21

FILED
17

Dear Mr. Clay:

We desire to acknowledge your request for an opinion on February 15, 1940, that part of your letter constituting your request, being as follows:

> "What we desire to know is: does this County have authority through the trustee, Collector or County Court to sell property which was offered for sale at the third sale on which there was no bids, or will the property have to be advertised again next year and just what proceedure this County should take covering the above circumstances."

Senate Bill No. 94, Laws of Missouri 1933, at page 425, provided for a first, second and third offering of lands for sale of delinquent taxes on real estate. Section 9953a, thereof, providing for a third offering, was repealed by Senate Bill No. 311, Laws of Missouri 1939, at page 851, making the third offering final by the requirement of a delivery of a deed to the purchaser. Said Senate Bill No. 311 also empowered the county court to appoint a trustee with discretionary authority to purchase at such third offering, which is, in part, as follows:

> "SECTION 9953b. It shall be lawful for the County Court of any County, and the

> Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

All lands which the trustee purchased at the sales executed under the provisions of said Senate Bill No. 311, may be sold by him at private sale upon order of court for whatever sum the court may decide.

In event no other persons bid at a sale provided by Section 9953a, and the trustee did not exercise his discretion in bidding at said sale there was, of course, no sale.

In event land had been advertised for sale for delinquent taxes at a third offering under the provisions of Senate Bill No. 94, Laws of Missouri 1933 and there was no bid, a statute providing for no further offering, a question of limitation becomes involved.

At the subsequent offering of lands and lots for delinquent taxes, after they had been offered three times under the provisions of said Senate Bill No. 94, without a bid, only such lands should have been reoffered for sale which were not within the statute of limitations.

Section 9952a, Laws of Missouri 1933, at page 430 is, in part, as follows:

> "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, * * * "

Section 9961, Laws of Missouri 1935, at page 405 is, as follows:

> "No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pur-

suant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained. * * * "

Section 9953a of Senate Bill No. 311, Laws of Missouri 1939, at page 851 is, in part, as follows:

" * * * No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. If any lands or lots are not sold at such third offering, then the Collector, in his discretion, need not again advertise or offer such lands or lots for sale oftener than once every five years after the third offering of such lands or lots, and such offering shall toll the operation of any applicable statute of limitations. * * * "

Section 9961, supra, passed in 1935 provided a statute of limitations as to proceedings for the sale of real estate for delinquent taxes and, therefore, applied to all proceedings provided in said Senate Bill No. 94 known as the Jones Munger Law passed in 1933. Said Section 9953a, Senate Bill No. 311, Laws of Mo. 1939, at page 851, repealed the redemption third sale of the 1933 law and created a non redemption

third sale. The 1939 law, in said section, also provided a new statute of limitation applicable to sales under such section, without repealing said Section 9961, supra. They are irreconcilably repugnant to each other and, therefore, the limitation provided in said Section 9953a, Senate Bill No. 311, relating to the subsequent sale to the third sale repeals by implication said Section 9961, supra, but only insofar as it applies to said Section 9953a, Senate Bill No. 311.

This rule applicable to the above proposition was stated in the case, Miners Bank v. Clark, 216 Mo. App. 130, 134, as follows:

> "Appellants rely on what was said in the case of Asel v. City of Jefferson, 287 Mo. 195, 229 S. W. 1046. On pages 207 and 208, the court in discussing these sections of the statute heretofore referred to, held that the Act of 1919 necessarily repeals the Act of 1911. As we understand that case, it holds merely that that portion of sections 8323 and 8324 which related to the doing of the character of work that was done in that case, which was, as the record shows, the repairing and resurfacing of a street, and where the amount fell within sixty cents, would be controlled by the statute of 1919. * * * Section 8301, Revised Statutes 1919, only by implication repeals any portion of sections 8323 and 8324, and it is a well-settled rule of construction that where an old law is repealed by implication it will be repealed only to the extent of making it consistent with the new law. (See 36 Cyc. 1037. See, also, State ex inf. Major v. Amick, 247 Mo. l. c. 290, 152 S. W. 591; Wrightsman v. Gideon, 247 S. W. l. c. 137; State ex rel. v. Clark, 275 Mo. l. c. 102, 204 S. W. 1090.)"

Also a rule bearing on the same question was stated in the case of State ex rel. v. Rinke, 140 Mo. App. 645, 662, wherein the court said:

> " * * * We are led to this conclusion by following the well-settled rules governing the interpretation of statutes, that a statute is held to be repealed only by an express provision of a subsequent law or by necessary implication; that a later statute will not repeal a former one by implication when the two laws are not irreconcilably inconsistent and can stand together; that if by fair interpretation all the sections of a statute can stand together, there is no repeal by implication, and that where there are two statutes upon the same subject, they should be so construed as that both may stand if possible, the later repealing the earlier, pro tanto as to inconsistent provisions. * * * "

CONCLUSION

Therefore, it is the opinion of this department that a trustee appointed, under the provisions of Section 9953b, Laws of Missouri 1939, at page 851, can sell lands purchased at a third offering of delinquent tax lands only upon order of the county court; that if no bid is offered at such sale, there is no sale, and there being no sale the collector, in his discretion, need not advertise or offer the same oftener than once every five years after said third offering and such offering shall toll the operation of any applicable statute of limitations. It is, further, our opinion that Section 9953a of Senate Bill No. 311, supra, repeals by implication said Section 9961, supra, as to the question of limitations, insofar as it applies to said Section 9953a, supra, and that it is the duty of the collector to offer

such lands at least once every five years after said third offering, without a bid thereon, in order to toll such statute of limitations.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

SVM:LB

PENAL INSTITUTIONS: The governor's consent to transfer of a prisoner from the Intermediate Reformatory to the Penitentiary may be given as a part of the governor's revocation of the prisoner's parole. With such consent, subject to the provisions of said Section 8475b, a prisoner may be so transferred.

GOVERNOR'S CONSENT TO TRANSFER :

June 22, 1940

7-9

FILED
17

Mr. Grover C. Clevenger, Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion in your letter dated June 18, 1940, which is in the following terms:

> "Attached is a form used by the Governor to revoke conditional commutations issued to inmates of the Intermediate Reformatory for Young Men (Algoa Farms).
>
> It is customary for such violators to be transferred from Algoa to the Penitentiary to complete the unexpired portion of their terms. The transfers are ordered and signed by the Governor after the violators are returned to Algoa following the revocation.
>
> Near the end of the form, written in red for your convenience, has been inserted the phrase, 'and direct that the unexpired portion of his sentence be served at the Missouri State Penitentiary'. In this way a transfer and revocation could be effected by one document.
>
> Please inform us if this prodedure is permissible."

Section 8474, R. S. 1929, Mo. Stat. Ann. page 6625

provides:

> "If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

Section 8475, subsection b, R. S. Mo. 1929, Mo. Stat. Ann. page 6226, in part provides:

> "The department of penal institutions shall have the power, with the consent of the governor, to transfer to the penitentiary any prisoner who subsequent to his committal to the intermediate reformatory, shall be shown to their satisfaction to have been, at the time of his conviction, twenty-five years of age or over, or to have been previously convicted of a felony; and may also transfer any apparently incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the inmates of the institution."

The last quoted statute does not provide by what method the consent of the governor to the transfer shall be given. The giving of such consent as a part of the governor's revocation of the prisoner's parole, as suggested in your letter dated June 18, 1940, would provide a permanent record of such consent over the signature of the governor, and in our opinion is a proper method.

However, it is the Department of Penal Institutions which has the power to direct the transfer, and not the governor. A prisoner, subject to the provisions of said Section 8475b, should be transferred to the State Penitentiary from the Intermediate Reformatory only when the Department of Penal Institutions has made an order therefor, with the consent of the governor. It was so ruled in an opinion of the attorney general dated August 16, 1934 (No. 80) of which a copy is hereto attached. Consistent with the foregoing propositions, and to the end that the giving of the governor's consent may follow the words of the statute, said Section 8475, subsection b, we would suggest that the consent be given in substantially the following terms:

> "and hereby give my consent as governor to the transfer of the said _____ from the Intermediate Reformatory to the Missouri State Penitentiary, as provided by Section 8475, subsection b, R. S. Mo. 1929."

CONCLUSION

The governor's consent to transfer of a prisoner from the Intermediate Reformatory to the penitentiary may be given as a part of the governor's revocation of the prisoner's parole. With such consent, subject to the provisions of said Section 8475b, a prisoner may be so transferred.

APPROVED: Respectfully submitted,

COVELL R. HEWITT
(Acting) Attorney General

LAWRENCE L. BRADLEY
Assistant Attorney General

EH:RT

PENAL INSTITUTIONS: Sentences are cumulative and not concurrent where prisoner, while at large on parole from the penitentiary, commits a second felony, is convicted on that charge and sentenced to the penitentiary. The first sentence must be served first. Incorrect prison records should be changed in such manner as to show the serving of sentences in the order of sequence required by law.

CHANGING RECORDS:

August 12, 1940

8/1 a

FILED
17

Honorable Grover C. Clevenger
Director, Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated June 18, 1940, which is in the following terms:

> "More than 150 inmates at the Penitentiary are parole or commutation violators whose paroles or commutations have been revoked because of subsequent convictions.
>
> It has been customary to record a violator as serving his second sentence from the time he re-enters the Penitentiary, giving him a discharge when the (second) sentence expires. He is then held in custody to serve the balance of the original (revoked) sentence.
>
> According to a recent decision of the Supreme Court (Ex parte Herring vs. T. M. Scott) it would seem that such a manner of arranging our records does not comply with Sec. 12969, R. S. Mo., 1929.
>
> In cases where Penitentiary records show that an inmate has been booked to serve the second sentence before completing the unexpired portion of the original term, will it be permissible to change our records to conform

with the statute and court decision by the following procedure:

(a) Replace the inmate under his original sentence, giving him credit for all time served by him from the date upon which he entered the Penitentiary the second time.

(b) Upon the expiration of the original sentence mark him as beginning service on the second sentence, computing his time anew from the day following the final expiration of his first sentence.

Please advise us if this way of amending our records to conform with the statute will, in your opinion, entitle an inmate to claim credit for the time he was erroneously booked under the second sentence while he should have been shown by the records to be completing his original term."

Section 12969 R. S. Mo. 1929, Mo. St. Ann. page 1973 provides:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence

> to run until the expiration of the s entence under which he may be held; Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Your attention is directed to an opinion of the Attorney General dated July 1, 1940, and addressed to you, which deals with points closely related to this opinion. As we stated in that opinion in Ex parte Green 17 S. W. (2nd) 939, l.c. 940, 322 Mo. 857, the Supreme Court said:

> "The Warden is mistaken when he states in his return that the petitioner when again confined in the penitentiary first served his sentence under the (second) commitment issued by the circuit court of Lafayette county.
>
> When the petitioner was returned to the penitentiary, he was there under commitments from the circuit courts of both St. Charles and Lafayette counties. The warden and other officials were without authority to determine the order in which the sentences should be served. That question is determined by section 2292, R. S. 1919."

This rule applies to one who, while at large on parole from the penitentiary, commits a second felony and is convicted on that charge and again sentenced to the penitentiary. According to that rule, as a matter of law, all of the time required by law to be served under the first sentence must be served before the time so required to be served under the second sentence can commence. If the penitentiary records purport to show the serving of sentences in any other order of sequence, then the records are incorrect and should be changed in such manner as to

conform to the law as above stated. It follows that the amendment of the penitentiary records in the manner suggested in your said letter dated June 18, 1940, is proper.

In your letter, you ask whether such amendment will "entitle an inmate to claim credit for the time he was erroneously booked under the second sentence while he should have been shown by the records to be completing his original term." It will not entitle any prisoner to claim credit as to both sentences at the same time for any of the time served, because the two sentences are cumulative and not concurrent. It was so ruled in Ex parte Green, supra, and in Lee vs. Gilvan 229 S. W. 1045, 287 Mo. 231, where the court said:

> "Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative.
>
> This was the conclusion reached in Ex parte Allen, 196 Mo. 226, 95 S. W. 415."

In your letter of June 18th, you referred to the case of Ex parte Herring vs. Scott. That case was heard in the Supreme Court and the petitioner was ordered discharged on June 14, 1940. A copy of the opinion of the Court, which was filed on August 3, 1940, is hereto attached. That opinion is authority for this one, and regarding the points here considered, the Court there said:

> "Furthermore, the Lee case was decided by Division 2 of this court in 1921, and the question was reconsidered by the court en banc in 1929, Ex parte Green, 322 Mo. 857, 17 S. W. (2d) 939. There the court held unanimously (without mentioning the Lee case, it is true) that the prison officials were without authority

to determine the order in which the sentences should be served, and that the requirement of the statute is controlling. * * * * * * * * * * * * * *

But we are not to be understood as meaning that the convict can eat his cake and have it too - in other words, that if the petitioner's second parole should be legally revoked, he will be entitled to time with which he has been mistakenly credited on his second sentence, and which by this proceeding is being transferred to his first sentence in satisfaction thereon. We do not rule that such time can be counted on both sentences. That question is not presented in this case, but we make the statement to clarify the opinion."

CONCLUSION

Sentences are cumulative and not concurrent where prisoner, while at large on parole from the penitentiary, commits a second felony, is convicted on that charge and sentenced to the penitentiary. The first sentence must be served first. Incorrect prison records should be changed in such manner as to show the serving of sentences in the order of sequence required by law.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
EH:RT

PENAL INSTITUTIONS: Convicted, sentenced, incarcerated, paroled. While at large on parole, committed second felony, and again convicted, sentenced, incarcerated. Served total time on first sentence, and paroled as to second one. First sentence must be served first.

PRISONER RELEASED WHEN:

August 15, 1940

8-21

FILED
17

Mr. Grover C. Clevenger, Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated June 18, 1940, which is in the following terms:

"On June 14, 1940, the Supreme Court ordered Harry Herring, No. 28512, released from the Penitentiary on his appeal for a writ of habeas corpus.

Herring originally had been received at the Penitentiary in 1925 to serve a sentence of fifteen years. He was paroled from this sentence in 1930. In 1933, he was again received at the Penitentiary to serve another sentenceof ten years, and the parole on his original sentence was revoked.

After serving approximately seven-twelfths of his second sentence, he was discharged from the second sentence under a conditional commutation, and was held to complete the remainder of his original sentence, upon which he had been given no credit on our records until his discharge from the second sentence.

The Court held that, in compliance with Sec. 12969, R. S. Mo. 1929, Herring should have been booked to serve the remainder of his first sentence when delivered to prison under the second commitment, and that since

he had complied with the terms of the first sentence in that he had completed nine-twelfths of fifteen years, he was entitled to his release. The Court also recognized as valid the conditional commutation issued him on the second sentence and ruled that, having complied with the first sentence and having in his possession a discharge from the second sentence, he could no longer be legally imprisoned.

We have at present in the Penitentiary about forty inmates whose cases are identical to Herring's, and who could without doubt appeal for release as successfully as he did. Will it, in your opinion, be necessary for each of these inmates to appeal to the Court for release, or may the Warden discharge them on the basis of Herring's case, thus permitting their release without individual recourse to the Court?"

Section 12969 R. S. Mo. 1929, Mo. St. Ann. page 1973 provides:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held; Provided, that

> if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

In your letter dated June 18, 1940, you referred to the case of Ex parte Herring vs. Scott. That case was heard in the Supreme Court and the petitioner was ordered discharged on June 14, 1940. A copy of that opinion, which was filed on August 3, 1940, was sent to you with our opinion dated August 12, 1940 (Our No. 253). That opinion is authority for this one.

Said Section 12969 is applicable to the sentences to be served by one who commits a second felony while at large under a parole by the governor. It was so ruled, under the statute containing the same provisions as said Section 12969, in Lee vs. Gilvan 229 S. W. 1045, 287 Mo. 231, in Ex parte Green 17 S. W. (2nd) 939, 322 Mo. 857 and in Ex parte Herring vs. Scott, where the court in part said:

> "There is no doubt about the fact that the statute applies to the petitioner. He did commit the second crime of robbery in Jackson County while under sentence for the first crime of robbery. The fact that he was out on parole when the second offense was committed, did not make him any the less 'under sentence' for the first offense."

When the prisoner in this case was convicted of the charge of having committed the second felony as aforesaid, the revocation of his parole as to his first sentence then became effective. In Ex parte Green 17 S. W. (2nd) 939, l.c. 940, 322 Mo. 857, the Supreme Court said:

> "The revocation of the parole became effective upon the petitioner's conviction and sentence in said court. That was a judicial determination that he had violated one of the conditions of his parole. Ex parte Strauss (Mo. Sup.) 7 S. W. (2d) 1000."

After the second conviction and when the prisoner was incarcerated in the penitentiary for the second time, he then commenced to serve the remainder of his first sentence. As a matter of law, he must serve all of the first sentence before he can commence to serve the second one. In Ex parte Herring vs. Scott, supra, it was further said:

> "Furthermore, the Lee case was decided by Division 2 of this court in 1921, and the question was reconsidered by the court en banc in 1929, Ex parte Green, 322 Mo. 857, 17 S. W. (2nd) 939. There the court held unanimously (without mentioning the Lee case, it is true) that the prison officials were without authority to determine the order in which the sentences should be served, and that the requirement of the statute is controlling.
> *
> They (the legislators) were contemplating a situation where a convict under sentence for one felony commits another perhaps of a different kind and at a remotely later time. They saw fit to require that in event of conviction of the latter, the sentence therefor should not commence to run until the convict had fully paid his debt to the State for the first. Having so declared in a solemn legislative act, we are not at liberty to amend it by construction. The Green case so rules the question directly."

Before the expiration of the time required to be served

under the first sentence as aforesaid, this prisoner received the governor's conditional commutation parole as to his second sentence. When the first sentence did expire as aforesaid, there remained no legal authority for his imprisonment. Section 648 R. S. 1929, Mo. St. Ann. page 4896 provides:

> "No person's body shall be imprisoned or restrained unless by authority of law."

There being no legal authority, under the foregoing Supreme Court decisions, and statutes, for the imprisonment of the prisoner whose case is stated above, he and all prisoners whose cases are identical with his should be released. The warden should release said prisoners without waiting for them to resort to the courts.

For the reasons stated above, a prisoner to whose sentences said Section 12969 is applicable should be released even though he has not been paroled as to his second sentence, if he has been incarcerated for a period of time equal to the total cumulative periods of time required by law to be served under both sentences.

CONCLUSION

A prisoner should be released where the following facts exist. He was convicted, sentenced, incarcerated in the penitentiary and paroled by the governor. While at large on parole, he committed a second felony, was convicted on that charge, sentenced and again incarcerated in the penitentiary. He has served the period of time required by law to be served under the first sentence, and has been given the governor's conditional commutation parole as to the second sentence.

Also, a prisoner should be released after he has served the total cumulative periods of time required by law to be served under both sentences, without a parole as to the second one.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

EH:RT

SPECIAL ROAD DISTRICTS: Organized under Article 9, Chapter 42, R. S. Mo.1929

A special road district not disincorporated until Section 8057, Chapter 42, R. S. Missouri, 1929, has been complied with.

August 30, 1940

9-13

FILED 17

Hon. D. W. Clayton
Presiding Judge
County Court
Lawrence County
Mt. Vernon, Missouri

Dear Judge:

We acknowledge receipt of your letter of August 27, 1940, wherein you request an opinion from our office. Your request reads as follows:

"We have two road districts, (Vinyard and Red Oak) in this (Lawrence) County that were organized years ago as Eight Mile Special Road Districts, with City Councils, Article 9, Chapter 42, R.S. Mo. 1929.

"Some years thereafter the cities around which these two districts were organized were disorganized with the result, of course, there were no city councils.

"For some years these two districts have continued to operate as Eight Mile Special Road Districts with three Commissioners.

"Our present County Court refused to appoint Commissioners this year on the assumption that the districts are not now legally organized since there are

no city councils. We advised these districts to dissolve under Section 8057 Road Laws of Missouri as revised for the years 1939-1940, and organize as Benefit Assessment Districts.

"There is some contention that these two districts were automatically dissolved when the cities were disorganized, since there were no city councils thereafter.

"Our question is this: Were these districts automatically dissolved when the cities disorganized, and if so can they organize as Benefit Assessments without any dissolution proceedings? If they are not automatically dissolved, what should be the procedure?"

Upon the reading of Article 9, Chapter 42, R. S. Missouri, 1929, we find that this article deals with special road districts in certain counties. Section 8024 R. S. Missouri, 1929 reads as follows:

"Special road districts may be organized, where--how.--Territory not exceeding eight miles, square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district: Provided, however, the provisions of this section shall not apply to counties under township organization, and shall not apply to all counties in this state now containing or which may hereafter contain 50,000 inhabitants or more and lying adjoining any city of this state containing 300,000 inhabitants or more."

It will be observed that upon the close reading of the aforesaid section, and other sections contained in Article 9, that the legislature has set up a complete method of organization.

Section 8057 R. S. Missouri, 1929, reads as follows:

> "Proposition may be resubmitted, when. -- If any district shall have adopted the provisions of this article, the question may be resubmitted after the expiration of four years, upon the petition of fifty resident taxpayers of said district, at the ensuing general election, and if a majority of the votes of the district be cast against it, the operation of the law shall cease in said district."

It will be observed that Section 8057, supra, provides that the question may be resubmitted after the expiration of four years upon the petition of fifty resident taxpayers of said district, at the ensuing general election, and if a majority of the votes of the district be cast against it, the operation of the law shall cease in said district. Upon reading the other sections in this article, when taken together with Section 8057, supra, we are of the opinion that it is clearly the legislative intent that special road districts formed under this article can only be disorganized through the strict following of Section 8057, supra. It will be noted in the reading of Article 10, R. S. Missouri, 1929, that special road districts organized under county courts are disincorporated under sections contained in this article, which clearly shows that the legislature intended to provide distinct methods for the organization and disorganization of special road districts formed under either plan.

In your request you asked the question: Were these districts automatically dissolved when the cities dis-

organized, and if so can they organize as Benefit Assessments without any dissolution proceedings? We are enclosing an opinion which has been heretofore rendered by this office, to Mr. Robert W. Hawkins, Prosecuting Attorney, Pemiscot County, Caruthersville, Missouri, wherein this office went on record as holding that county courts are without authority to elect commissioners after city in district has ceased to exist as such.

We are of the opinion that even though the cities in the district cease to exist and even though the county court does not have authority to elect commissioners, as is provided in the opinion enclosed, that this does not automatically dissolve the district for the reason that the district is in the first instant a creature of the statute and after once having been created, in compliance with the several statutes, and once having procured its corporate life from the state, this corporate life cannot be taken away unless it is done in compliance with statutes which conform the method of taking away that corporate life, namely, the disorganization.

Therefore, the presence of Section 8057, supra, wherein a distinct method is set forth for the disorganization of a district once organized under other sections contained in this article it is absolutely incumbent that the procedure be followed in order to bring about a disorganization. Of course, after the disorganization has once been perfected and all the conditions have been fully complied with, then the resident taxpayers could take the benefit of any plan of organization that would be afforded them by the statutes, for the obvious reason that after they had once been disincorporated they would be placed in the position that they were in before they were incorporated.

CONCLUSION

In conclusion it is therefore our opinion that Section 8057 R. S. Missouri, 1929, will have to be complied with before a disorganization can be perfected in a special road

district organized under Article 9, Chapter 42, R. S. Missouri, 1929.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:RW

BOARD OF POLICE COMMISSIONERS: - Members may not accept other offices without forfeiting position of member of Board.

11/20

November 15, 1940

FILED 17

Hon. John M. Cleary, Jr.
Secretary
Board of Police Commissioners
Kansas City, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated November 4, 1940, which is as follows:

> "The Board of Police Commissioners of Kansas City, Missouri, desires your opinion on the following question:
>
> Mr. George Fiske, Police Commissioner, has been asked to serve as Major in the Third Missouri Regiment (Home Guard Unit) while the National Guard is in camp for a year. However, section 7505 of the Kansas City Police Act (Laws of Missouri 1939, page 549) provides as follows:
>
> 'Any one of said commissioners so appointed or any member of any such police force who, during the term of his office, shall accept any other place of public trust, or emolument, * * * shall be deemed to have thereby forfeited

and vacated his office as such commissioner or member of such police force.'

In addition, there are several members of the Department, including myself, who are considering joining the Home Guard.

Your opinion is therefore requested as to whether the acceptance of a commission as Major in the Third Missouri Regiment would cause Mr. Fiske to forfeit his office as Police Commissioner of Kansas City, Missouri. Since the Third Missouri Regiment is to be organized very shortly, we request that you give us an opinion upon the question as speedily as possible."

Section 7505 found in Laws of 1939, at page 549, referred to by you, is as follows -

"Any one of said commissioners so appointed or any member of any such police force who, during the term of his office, shall accept any other place of public trust, or emolument, or who shall knowingly receive any nomination for an office elective by the people, and shall fail to decline such nomination publicly within the five days succeeding such nomination, or shall become a candidate for the nomination for any office at the hands of any political party, shall be deemed to have thereby forfeited and vacated his office as such commissioner or member of such police force."

In addition to the foregoing statutory provision we believe that Section 18, Article 9, of the Missouri Constitution is authority for the statement that an officer of the militia or National Guard is a state officer. This section reads as follows -

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

The principal implication of this section includes officers of the National Guard within the meaning of the term "state officer."

Furthermore, a member of the Board of Police Commissioners in Kansas City is prohibited from receiving "emolument." This term has been defined in State v. Dishman, 68 S. W. (2d) 797, l. c. 798, as follows -

> "We read in 29 Cyc. 1428, note 72, that the term 'emoluments' means the profit 'which is annexed to the possession of office, as salary, fees, and perquisites' (Town of Bruce v. Dickey, 116 Ill. 527, 535, 6 N. E. 435, 439), pecuniary in

character (Reals v. Smith, 8 Wyo. 159, 168, 56 P. 690), and embraces 'all other proper receipts of the office not included within the terms "fees" or "commissions"' (Arapahoe County v. Hall, 9 Colo. App. 538, 49 P. 370, 372; Vansant v. State, 96 Md. 110, 128, 53 A. 711; Hoyt v. U. S., 10 How. 109, 135, 13 L. Ed. 348; Id., 10 How. 646, 13 L. Ed. 576)."

Since a Major or officer in the Missouri National Guard receives a salary and certain perquisites, the acceptance of such office would be a direct violation of Section 7505, supra. Although it seems to us that the Legislature might well have followed the exception set out in Section 18, Article 9, of the Missouri Constitution, and that, as a matter of public policy no conflict, so far as the public interest is concerned, would result from the acceptance of a commission in the Home Guard by a member of the Board of Police Commissioners, it is the conclusion of this department that the acceptance of such commission by a member of the Board of Police Commissioners of Kansas City, Missouri, would result in the forfeiture by such officer of his office as a member of the Board. On the contrary if a member of the Board is appointed an officer in the Missouri National Guard, or its successor, the Home Guard, which is not an office of public trust, and to which no perquisites are attached and no salary received, the statute would not be violated and his office as a member of the Board of Police Commissioners could not be declared forfeited.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

COUNTY BUDGET ACT: (1) Sectons 1 and 2, Laws of 1937, page 422, are not repealed by Laws of 1939, p. 660;
(2) Counties of under 50000 can protest warrants and thus enable them to borrow money until taxes are collected.

February 12, 1940

2-14

FILED
18

Honorable J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This Department is in receipt of your letter of February 8th, wherein you make the following inquiry:

> "Frankly, I am very confused concerning the budget laws under the Laws of 1939. At page 660 of the Laws of 1939 it provides in the repealing clause that Section 17 of the Laws of 1933 at page 340, as amended by the Laws of 1937 at pages 422 to 424, and 427 to 430, inclusive, are repealed. This, I assume means that Sections 2 and 5 of the laws have been repealed and are no longer in effect and that Section 17 of the Laws of 1939, at page 660, is now the only law applicable in this matter. If this be true, then I wish to inquire concerning the rights of our county court in the following instances.
>
> "Our county, as of January 1, 1940, has on hand some $15,000.00 in cash to begin the new budget year. Under the provisions of Section 17 at page 660 of the Laws of 1939, the county court is desirous of borrowing money from a local bank up to the 90% of the anticipated revenue for 1940,

to pay warrants as they are issued. They, however, wish to borrow this money only as needed from the bank and pay interest from the date of the borrowing of the same. Upon this theory, they would of course, use the money on hand to pay warrants as they are issued at the present time until it has been exhausted and then borrow from the bank the money as needed each month after the present supply of cash has been exhausted. They of course, will have an understanding with the local bank that this money shall be advanced at a specified rate of interest upon the execution and delivery of a warrant under the provisions of section 17, so that they may be sure that the money will be available at any time the county may desire the same.

"The questions I would like to determine are these: may Barton County, which is a county under 50,000 population, borrow money under the provisions of Section 17 of the Laws of 1933, at page 349, as amended by the Laws of 1939 at page 660, to pay warrants as they come due as above set out, notwithstanding the provision of Section 1 of the budget law, at page 340 of the Laws of 1933, as amended by the Laws of 1939, at page 657, which provides that counties under 50,000 shall be governed by the first eight sections of the act?

"If Section 17 does not apply to this county, an answer to that effect would answer all inquiries in this matter. However, if the county is authorized to borrow money under the provisions of Section 17, may this county use the money on hand to pay

warrants as they come due until it is exhausted and then borrow money as needed to pay warrants as issued in the future, notwithstanding the laws under the statutes as to the classification and payment of warrants, to the effect that all warrants of class 1 must be paid before class 2 warrants can be met, and 2 before 3, and so on?

"Also, I would like to have the opinion of your office as to the effect of Section 1 of the Laws of 1939, at page 660, which clearly states that the provisions of the "Laws of Missouri for 1937, found at page 422 to 424 (which are sections 2 and 5 of the original Act) both inclusive, be and the same is hereby repealed," as to whether or not this repeal section does actually repeal the provisions of Sections 2 and 5 of the original Act as amended by the Laws of 1937 at pages 422 to 424, as Section 1 would seem to indicate, and if said sections 2 and 5 are repealed, does that have the effect of doing away with the classification of expenditures in counties under 50,000?"

Your first question relates to the title of the amended Act of 1939, page 660. You contend that the title and the repealing section - Section 1 - which is almost identical with the title of the act itself, can be construed to repeal Sections 1 and 2 of the original act, being Laws of Missouri, 1933, page 340 et seq. The title to the Act of 1939 is as follows:

"AN ACT to amend an act of the 57th General Assembly designated as the County Budget Law, Laws of Missouri, 1933, page 340 as amended by acts of the 59th General Assembly, Laws of Missouri, 1937, found at pages 422

> to 424, both inclusive and pages 427 to 430 both inclusive, by repealing Section 17 of said act and by enacting in lieu thereof a new Section to be known as Section 17 relating to the same subject matter and providing for the registration of certain warrants and giving them preference and priority in payment, and declaring this act to be a revision bill."

Section 17 of the original act, page 349, Laws of Missouri, 1933, refers to the powers of the county court to borrow money in counties of more than 50,000 inhabitants, because, by Section 1, page 340, it is expressly recited,

> "shall be governed by Sections 1 to 8 inclusive, of this act."

Section 9, page 346, Laws of Missouri, 1933, states,

> "* * * The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20 inclusive of this Act shall apply to such Counties."

Reverting to the title above quoted, the gist and the essence of the same is to repeal Section 17 of the Laws of Missouri, 1933, and enact a new section in lieu thereof. The first part of the title refers to an amendment made by the Legislature in 1937 relating to Sections 1 and 2 of the Laws of 1933, and may be more or less treated as historical and surplusage. The title to the act, when it is analyzed and the surplusage excluded, repeals and reenacts Section 17, and nothing more. By merely referring to the action of the Legislature in amending Sections 1 and 2 of the Laws of 1933, we cannot interpret the title to repeal Sections 1 and 2.

In State ex rel. Consolidated District v. Miller, 33 S. W. (2d) 122, it was held that the mere reference to an act or a section by title of the amending act is sufficient without other description of the subject matter.

In the case of Wilhite v. Rathburn, 69 S. W. (2d) 708, it was held that the title of an act should be liberally construed to support power sought to be exercised by the Legislature. Other decisions which bear out our theory are, Sherill v. Brantley, 66 S. W. (2d) 529, and Graves v. Purcell, 85 S. W. (2d) 543.

In view of our interpretation as argued above, we are of the opinion that the act of the Legislature in 1937 in repealing and reenacting Sections 1 and 2 of the original Budget Act, is not repealed by the Act of 1939, page 660, and that said sections are in full force and effect and that Laws of Missouri, 1937, page 422, is now the valid and existing law relating to counties of less than 50,000 population. We are of the further opinion that Section 17, as repealed and reenacted by the Laws of Missouri, 1939, still relates solely to counties of more than 50,000 population, and, therefore, your county could not take advantage of the provisions of said section because it is less than 50,000 and still governed by the provisions of the original act - Sections 1 to 8, inclusive.

This conclusion also answers your question in the next to the last paragraph of your letter. However, since your letter contains full facts regarding the matter and the desire for your county to borrow money to meet the lawful expenditures of the county until the collection of taxes, we think, in reality, it involves the question of what is commonly referred to as "protested warrants." Therefore, having held above that Section 17 does not empower counties of the population of your county to borrow money, yet the question may be considered from another angle, that is, to the effect of whether or not the Budget Act in counties of less than 50,000 precludes counties from protesting warrants. This question was before this Department in an opinion rendered to Honorable Frank D. Sheible, County Treasurer, Hillsboro, Missouri, on August 19, 1936, and in view of the apparent splendid financial condition which the facts show that prevails in your county now, we are of the opinion that you may follow the enclosed opinion to Mr. Sheible and obtain the same object which you desire.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

W. J. Burke
(Acting) Attorney-General

OWN:EG

JUSTICE OF THE PEACE: When township is divided, justice becomes justice of the peace of the township in which he is thrown. One justice is to be elected in Lemay and Gravois townships in 1940.

May 8, 1940

6-14

FILED
18

Mrs. Jessie F. Coleman, Secretary
Democratic County Committee
9211 Pavia
St. Louis County
Clayton, Missouri

Dear Mrs. Coleman:

This department is in receipt of your request for an official opinion which reads as follows:

> "I would appreciate an opinion at your earliest convenience upon the following matter:
>
> "In 1938 there were elected in Carondelet Township in St. Louis County two justices of the peace. In 1939 the county court divided Carondelet Township into Lemay and Gravois Townships and of the two justices of the peace elected for Carondelet Township, one of them fell within the confines of Lemay Township and the other in Gravois Township.
>
> "We would like to know how many justices are to be elected in Lemay and Gravois Townships at the next election."

This department, on October 2, 1939, in an opinion addressed to the Honorable C. W. Detjen, County Counselor of St. Louis County, held that a justice of the peace of a township which was divided, retained jurisdiction over the entire area constituting the original township. This opinion was written when Carondelet Township of St. Louis County was divided into two new townships, Lemay and Gravois, and certain precincts of other townships were added to the two new

ones. The conclusion was that the justices of the peace of Carondelet Township had jurisdiction over what was formerly Carondelet Township.

In answering your request, this opinion comes up for reconsideration. The whole question revolves around the meaning of Section 2150, R. S. Missouri 1929, which reads as follows:

> "When a township shall be divided, and any justice of the peace of the original township shall fall into the new township, he shall continue to discharge the duties of justice of the peace until his commission expires as if the township had not been divided."

We quote from the first opinion which we believe succinctly states the proposition involved:

> "Briefly, a determination of the legislative intent in using the following words in Section 2150, supra, will practically answer your inquiry, 'he shall continue to discharge the duties of justice of the peace until his commission expires as if the township had not been divided.'
>
> "Do the words 'as if the township had not been divided' refer back to the duties of the Justice of the peace or does it refer to the original jurisdiction of the Justice of the Peace?"

It is well settled in Missouri that a justice of the peace is a municipal township officer. Carpenter v. Roth, 91 S. W. 540, 192 Mo. 658; State ex rel. Walker v. Powles, 37 S. W. 1124, 136 Mo. 376.

It will be noted that the statute provides that the justice shall continue to discharge his "duties."

As was said in Martineau v. Crabbe, 150 Pac. 301, 46 Utah 327:

> "The term 'duties,' as used, comprehends only judicial acts, and such ministerial acts as justices must perform in their official capacity, * * * "

The duties of a justice of the peace, we believe, are not the same as his jurisdiction as used in the sense of territorial extent.

In Krum's Missouri Justice, page 1 it is stated:

> "Jurisdiction, when used in reference to judicial proceedings, is understood to mean, legal authority--extent of power--or district to which any authority extends.
>
> "Justices of the Peace derive all their powers from the statute laws of the State: they are limited in legal authority--extent of power--and to the district or territory over which their authority extends; hence, these courts are denominated Courts of Inferior Jurisdiction.
>
> "It is a general rule, that inferior jurisdictions, proceeding according to the course of the common law, are confined strictly to the authority given them; and, as a general proposition, it may be said, that such jurisdictions take nothing by implication, and whatever powers they exert must be expressly given in every instance."

There is no doubt that the statute is ambiguous and uncertain in its meaning. The phrase "shall fall into the new township" implies a restriction on the jurisdiction of the justice of the peace, while the

phrase "as if the township had not been divided" seems to indicate that the jurisdiction shall be the same as he had in the original township.

It is a general rule that, where a statute is uncertain and on its face susceptible of more than one construction, the court may look to prior and contemporaneous statutes to determine its meaning. In 59 Corpus Juris, 1042, it is said:

> "Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose; * * * * * * * * * * * It is a well established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, * * * "

This rule of construction is followed in Missouri.

In other words, in determining the meaning of a particular statute resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in mind, therefore, it is proper to consider not only the acts passed at the same session of the legislature but also acts passed at prior and subsequent sessions. State v. Davis, 284 S. W. 464, 314 Mo. 373; McAllister v. Terminal Railroad Co., 25 S. W. (2d) 791, 324 Mo. 1005; State ex rel. Shartel v. Westhues, 9 S. W. (2d) 612, 320 Mo. 1093; Hannibal Trust Co. v. Elzea, 286 S. W. 371, 315 Mo. 485.

Section 2150, supra, was first enacted in 1835 (Revised Statutes of Missouri, 1835, page 344). At that same session there was passed an act relating to constables, which provided as follows (Revised Statutes of Missouri, 1835, page 116):

> "If any township be divided, the constable in office at the time of the division shall continue to be the constable of the township in which his residence is, and another constable shall be appointed for the other township, as in case of vacancy."

This act is still the law in Missouri and is now Section 11757 of the Revised Statutes of Missouri 1929. In 1873 the General Assembly enacted the law providing for township organization. Included in that law was the following provision (Laws of Missouri 1873, page 99):

> "No change or alteration of the boundaries of a township shall vacate the office of any justice of the peace elected and residing therein, but such justice shall be a justice of the township into which he may be thrown by such change or alteration, and shall hold his office for the term for which he was elected. Constables shall also be subject to the provisions of this section."

This provision is now Section 12266 of the Revised Statutes of Missouri, 1929.

Therefore, all statutes that have been enacted relating to the status of justices of the peace and constables after a township has been divided are uniform in holding that the officer retains jurisdiction only over the district in which he resides. Therefore, we can assume that the legislature intended that this rule should apply to justices of the peace

in townships in counties not under township organization. This view is the one accepted by Kelly, in his splendid work on "Justices of the Peace in Missouri" which says (page 3):

> "No change or alteration of the boundaries of a township will vacate the office of justice, but the justice will hold his office for the term for which he was elected, in the township in which he is thrown." (citing Section 2150 as authority)

Kelly further says at page 7:

> "* * when a township is divided, and any justice in the original township shall fall into the new township, he shall continue in office until his terms expires, as if the township had not been changed. * * * "

Moreover, there are statutes which seem to indicate that a justice must be a resident of the district or township in which he acts.

Section 2141, R. S. Missouri 1929, provides that:

> "No person shall be eligible to the office of justice of the peace * * * * who shall not have been an inhabitant * * * of the township for which he is chosen six months next before his election, if such townships shall have been so long established, but if not, then of the township from which the same shall have been taken."

Section 2164, R. S. Missouri 1929, provides:

> "Whenever a justice of the peace shall resign, move out of the

> township or be otherwise disqualified, he shall immediately thereafter deliver to the clerk of the county court, or, if in the city of St. Louis, the city register, all dockets, records, books, papers and documents appertaining to his office, * * * * * * * * * * * * "

There is still another reason why we believe that a justice of the peace after a division of township lines becomes a justice of the township in which he resides. As was said above, a justice is a municipal township officer. Furthermore, when a township is divided into new townships, the old township is no longer in existence. State ex rel. Frank v. Tegethoff, 89 S. W. (2d) 666.

To hold that a justice retains his original jurisdiction would make him a justice of the peace of a nonexistent township. How then could a litigant comply with Section 2170, R. S. Missouri 1929, which provides:

> "Every action recognizable before a justice of the peace shall be brought before some justice of the township, either: First, wherein the defendants, or one of them, resides, or in any adjoining township; or, second, wherein the plaintiff resides, and the defendants, or one of them, may be found; third, if the defendant is a non-resident of the county in which the plaintiff resides, the action may be brought before some justice of any township in such county where the defendant may be found; fourth, if the defendant is a non-resident of the state, or has absconded from his usual place of abode, the action may be brought before any justice in any county in this state wherein defendant may be found; and, fifth, any action against a railroad company for killing or injuring horses, mules, cat-

> tle or other animals, shall be brought before a justice of the peace of the township in which the injury happened, or in any adjoining township."

It is a rule of construction that where the intention of the legislature is so vaguely expressed that the court must resort to construction that it is proper to consider the results and consequences and place upon the statute a construction whichwill not result in inconvenience, hardship or absurd consequences. State ex rel. St. Louis Public Service Co. v. Public Service Commission, 34 S. W. (2d) 486; Bassen v. Monckton, 274 S. W. 404, 308 Mo. 641.

We believe that in placing a justice in a named existing township will do away with the inconvenience and hardship that would beset a litigant seeking to determine the proper jurisdiction in which to sue.

In view of the above reasons, the opinion of this department of October 2, 1939, addressed to Honorable C. W. Detjen, County Counselor of St. Louis County, is hereby overruled, and it is now the opinion of this department that if any township is divided, the justice of the peace in office at the time of the division, shall continue to be the justice of the peace of the township in which he resides.

We now take up the question presented by your request. Section 2366, Laws of Missouri 1939, p. 340, provides as follows:

> "In all counties which now have or may hereafter have a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000) inhabitants according to the last United States decennial census, there shall be elected every four years two justices of the peace for each township therein and each shall receive a salary of

($2,000.00) Two Thousand Dollars per annum, payable monthly, out of the treasury of the county in which he is elected. Provided, that the two justices elected at large in each township at the general election of 1938 shall fill the offices herein provided in such counties, subject to the provisions of this Act, until January 1st, 1943 and beginning with the general election of 1942 no justice of the peace shall be elected except as herein provided, and provided further, from and after the effective date of this act and until January 1st, 1943, in any such county, all other duly elected justices of the peace now in office in such county may be paid by the county court such salary, clerk hire, and other expense as the county court may deem necessary and proper but not to exceed One Hundred Dollars ($100) per month total for each justice; and provided further that nothing herein contained shall be construed to require any election, general or special until said general election of 1942, and in all counties of this state which now contain or may hereafter contain a township now or hereafter containing not less than seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants according to the last United States decennial census, there shall be elected in every such township at the general election in the year 1942 and every four years thereafter three Justices of the Peace and each shall receive the salary of two thousand dollars per annum payable monthly out of the treasury of the county in which such Justice is elected."

Section 2140, R. S. Missouri 1929, provides:

> "When a vacancy occurs in the office of justice of the peace, the county court of the county in which such vacancy occurs may supply the same by the appointment of some person competent and qualified who shall hold his office until the next general election of county officers, and until his successor is elected, commissioned and qualified."

Under the above statutes each township is entitled to two justices of the peace, and in case of a vacancy in the office of justice of the peace, the county court may appoint some person who shall hold his office until at the next general election of county officers.

The County Clerk of St. Louis County informs this department that the county court has not appointed any justice of the peace for Lemay or Gravois Townships. Under the ruling that when a township is divided that the justice of the peace becomes a justice of the township in which he may fall, it will be seen that Lemay and Gravois Townships each have one justice of the peace who were the justices of the old Carondelet Township, therefore, there is one vacancy in the office of the justice of the peace in each of the two townships. Therefore, at the 1940 general election of county officers there shall be elected one justice of the peace each in Lemay and Gravois Townships in St. Louis County.

CONCLUSION.

It is, therefore, the opinion of this department that if any township is divided, the justice of the peace in office at the time of the division, shall continue to be the justice of the peace of the township in which he resides.

It is further the opinion of this department that there shall be elected at the next general election of county officers one justice of the peace for Lemay Township and one for Gravois Township in St. Louis County.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AO'K:DA

SCHOOLS: Person elected school director can qualify if taxes have been paid on property in which he had an interest or which could have been assessed to him, even though the taxes be paid by another party.

April 6, 1940

#9

FILED
19

Honorable Stephen Cornish
County Superintendent of Schools
Pike County Schools
Bowling Green, Missouri

Dear Sir:

This Department is in receipt of your letter of April 2d, wherein you make the following inquiry:

> "I would like to have an interpretation of Section 9287 of the 1938 Missouri School Law, from your office.
>
> "The law states that a director shall have paid a state and county tax within one year next preceding his election or appointment.
>
> "A young man has been elected director at the annual meeting this afternoon, but was not able to produce a tax receipt in his name.
>
> "However, he is a partner in certain personal property with his father. His father has paid taxes on this property within the past twelve months, and he has reimbursed his father for half of the tax.
>
> "Does this qualify him to serve as school director under Section 9287?"

Section 9287, R. S. Mo. 1929, referred to in your letter, is as follows:

> "The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age. Said directors shall be chosen by the qualified voters of the district at the time and in the manner prescribed in section 9283 of this article, and shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, except those elected at the first annual meeting held in the district under the provisions of this chapter, whose term of office shall be for one, two and three years, respectively. A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

We have heretofore under authorities interpreted this section, as it refers to the qualifications of a

director as a taxpayer, as not making it mandatory for the actual payment of taxes on assessed property in his name. You state that the young man who has been elected director has certain interests and is a partner with his father in personal property, and that the father has paid taxes on the partnership property or property in which the young man has an interest.

In the decision of State ex inf. Bellamy v. Menengali, 307 Mo. 447, the issue before the court was whether or not a woman who had been elected school director was qualified on the question of being a taxpayer. We quote a portion of the decision as follows (l. c. 453-454, 455):

> "In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard Dictionary, a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.' The evidence is clear and undisputed, that respondent on June 1, 1920, was the legal owner of the property heretofore described, and that it was not exempt from taxation.
>
> "Section 12756, Revised Statutes 1919, provides that: 'Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the emsuing year.'
>
> " The undisputed evidence of both respondent and her husband, shows, that some of her personal property was included in the assessment list for 1920, and that she signed her husband's name thereto.

"Section 12801 provides that: 'No assessment of property or charges for taxes thereon shall be considered illegal on account of any informality in making the assessment, or in the tax lists, or on account of the assessments not being made or completed within the time required by law.'

"It was shown without contradiction and without objection, by respondent's husband, that he paid the taxes on his property and that of his wife, mentioned in the assessment list, on December 22, 1921; and that he paid said taxes for the benefit of himself and wife. It appears from the evidence without question, that the automobile mentioned in the list was assessed at $250; that respondent was the joint owner with her husband of the undivided one-half of same, and that the taxes were paid on this machine by respondent's husband for the benefit of both.

* * * * * * * * *

"We are cited in the respective briefs of counsel to text-books, and decisions outside this State, which throw very little light on the merits of the case. It is clear to us that no citation of authority is needed to sustain the action of the lower court in holding that respondent was qualified to hold the office in question. If any authority were needed, the able and unanswerable opinion of Rombauer, J., in State ex rel. Circuit Attorney v. Macklin, 41 Mo. App. at page 339 and following,

> settles the question and expresses our views of the subject. It fully sustains the action of the lower court. On page 343, Judge Rombauer concisely states our theory of the law in a case of this character, as follows:
>
> "'If a person owns an interest in property and pays a tax thereon, he pays <u>his</u> tax regardless of the fact to whom the property is assessed.'"

We deem the principles of law as contained in the above decision to be applicable to the facts which you present. We are, therefore, of the opinion that if the young man who has been elected director possesses all the other qualifications that he can qualify on the question of being a taxpayer on the theory that he owns an interest in property and pays a tax regardless of the fact to whom the property is assessed.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

TAXATION - County Courts may compromise back taxes when value of land appears less than amount of taxes due.

1127

November 18, 1940

FILED
19

Hon. Roy Coyne
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of November 13, 1940, in which you inquire as to the powers of the County Court of Jasper County, Missouri, to compromise taxes under Section 9950 R. S. Missouri, 1929, as amended by Laws of Missouri, 1933, P. 427.

Section 9950 Laws of Missouri, 1933, P. 427, is as follows -

> "Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the

> said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

A search of the decisions concerning this section reveals that it has been mentioned by the Courts of

this State twice in decisions and then only incidentally. In State ex rel Karbe et al v. Bader et al, 78 S. W. (2d) 835 it was mentioned as being a part of Senate Bill 94, passed by the Legislature in 1933, and the validity of the entire bill was upheld by the Supreme Court. It was again casually mentioned in State ex rel v. Nolte, 138 S. W. (2d) 1016.

We believe, however, that the statute itself is clear and unambiguous, and under it the County Court has the right to compromise delinquent taxes on lands within its County if it appears : (1) that the market value of the land is not as much as the amount of back taxes, interest, costs and penalties charged against it, or, (2) that at a tax sale the land would not sell for the amount of such taxes, interest, costs and penalties. Since a County Court may speak through its records only, one or the other of the above findings must be made, and such finding must appear of record in the Court's order compromising the taxes. The order should also contain the amount fixed to be paid in full satisfaction of such delinquent taxes, and the collector should be ordered to issue a certificate of redemption of receipt of the amount fixed in the Court's order to the taxpayer with whom the compromise is made. The decree should also contain an order to the collector requiring him to apportion the sum received by way of compromise to the various funds to which the original taxes were due, in proportion as the amount received bears to the whole amount charged against the land.

CONCLUSION.

It is the opinion of this department that a decree of the County Court containing the above re-

quirements is a valid method by which a compromise of back taxes may be made.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

RLH:RW

COUNTY COURTS: May pledge warrants to corporations authorized to accept pledge of same.

1/5

January 3, 1940

FILED
20

Honorable L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated December 5, 1939, as follows:

"The County Court of Camden County has requested that I obtain an opinion from you relative to the following matters.

Camden County, Missouri, has some $10,000.00 or $12,000.00 of outstanding warrants for the years 1933, 1934, 1935 and 1937, the uncollected delinquent taxes for those years are more than $20,000.00. The County Court is desirous of issuing bonds to fund that indebtedness, however, it is probable that an election upon such a matter would not meet with the approval of two-thirds of the voters of the County, however, the Presiding Judge informed me that at the time of the building of the bridge across the Lake of the Ozarks he was in the office of a St. Louis Bond Attorney Firm and that they told him at that time that the County Courts of Missouri Counties could issue bonds to fund debts without submitting the matter to the people at an election. I have been unable to find any law authorizing such a procedure, however, I would appreciate your opinion as to that matter.

The Laws of Missouri for 1933 at page 358, Section 12184 A provide for the pooling of outstanding warrants and that they may

> be by the county pledged to certain agencies, corporations, etc. The county would like to have an opinion as to what use they could make of that section of the law when applied to the facts set forth in the preceding paragraph, also just what is meant by agencies, corporations, etc., as it is mentioned in the section."

The question raised in your second paragraph above, we believe was answered by our letter of December 8, 1939, enclosing an opinion formerly rendered by this department, holding that while a refunding issue of bonds might be made without a vote of the people, the bonds could be issued in the first instance only with approval of the voters of the county.

Your second question relates to Section 12184a, found at page 358, Laws of Missouri, 1933, and is as follows:

> "County Warrants issued under the authority of Article 8, Chapter 85, of the Revised Statutes of the State of Missouri, 1929, issued to pay any legal indebtedness of a county may be pooled by the holders thereof and assigned to such county and be pledged by the county court to any corporation, commission or agency created or authorized by Congress or the State of Missouri to accept a pledge of such Warrants and the county court is authorized to pledge the Warrants of any county issued under this article in a manner to conform to the requirements, rules and/or regulations of any such corporation, commission or agency. Upon a pledge of any such warrants as by this act authorized, funds available or to be available shall be segregated and set apart for the redemption of such warrants and interest thereon from the terms of such pledge in the same manner as if said warrants had been sold, and the lien of such pledged warrants and interest thereon shall be enforced in the same manner as provided in

> this article for warrants sold. Funds derived from a pledge of any such warrants shall be deposited, accounted for and paid to parties so pooling them in the same manner as if such warrants had been sold or as may be provided by the requirements, rules and/or regulations of the corporation, commission or agency accepting a pledge of such warrants and advancing funds thereon."

A search fails to reveal that this particular section has ever been interpreted by our courts. We will outline, therefore, what appears to us to be the necessary steps for a compliance with the foregoing section.

1. The outstanding warrants which are to be pledged must be assigned to the county. There should be a written contract setting out this assignment and enumerating the warrants involved.

2. The county court and the corporation or agency to whom the warrants are pledged should enter into a written agreement setting out the terms and conditions of the pledge.

3. The funds derived from the pledge should be paid the original holders in accordance with their agreement and a receipt taken therefor.

4. All funds received by the court, which should be applied to the retirement of the original warrants, must be set up in a separate fund for the benefit of the pledgee, the delinquent taxes for each year being segregated so that they may be applied to the warrants outstanding for that particular year. These funds must not be used in any other manner by the county court until the loan is repaid in full.

You made inquiry as to the meaning of the words "agency", "commission" and corporation", as used in the above quoted section. At the time this legislation was passed, the legislature probably had in mind the Reconstruction Finance Corporation, which was then authorized to make loans or advances to counties and other quasi public entities. Those permitted to accept a pledge of outstanding warrants must be authorized by Congress or the State of Missouri to enter into such contract. We believe this privilege would extend to any agency or corporation in Missouri which was not specifically prohibited from exercising this right, provided it had the power to make loans by its charters.

It is our conclusion, therefore, that any corporation or agency which may lawfully lend money in the State of Missouri may accept a pledge of outstanding county warrants where not prohibited by law, and that any corporation or agency created by Congress for that purpose, or duly authorized by it, may accept a pledge of past due county warrants under the conditions above outlined.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC

SCHOOL DISTRICTS: Boundaries

January 10, 1940

1-11

FILED
20

Hon. L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 30, 1939, which reads as follows:

"In the Eastern part of this County the last geodetical survey changed the boundary line between two school districts sufficiently to move a man's house from one district to the other, the latter school district had refused to recognize the survey and are refusing to admit the man's children to school in that district without the payment of tuition. The latter district is a consolidated district and provided transportation while the former district is a common district and if the man's children attended school there it would necessitate their walking several miles to school.

"It is my opinion that the geodetical survey should be recognized and the line established by it by the governing line, however, the board of the latter district are not inclined to accept either my recommendation or the recommendation of the Superin-

tendent of County Schools and desire that I secure your opinion upon the matter. I would appreciate your sending me the opinion in duplicate so that I may keep one for my files and send one to the board of schools."

The provision in our statutes for formation of consolidated districts is Section 9345 R. S. Missouri, 1929, which reads as follows:

"Three or more common school districts, or a village district having less than two hundred children of school age by last enumeration, together with two or more adjoining districts, may be consolidated into a new district for the purpose of maintaining both primary schools and a high school by proceedings had in accordance with the provisions of section 9275. When such new district is formed it shall be known as 'Consolidated district No. _____ of _____ county,' and shall organize at a special meeting within fifteen days after the formation thereof; such organization and the government of such consolidated district shall be under and in compliance with the laws governing town and city school districts as provided in article 4 of this chapter."

Section 9275, R. S. Missouri, 1929, which is referred to in Section 9345, supra, reads as follows:

"Formation of new districts.-- When it is deemed necessary to form a new district, to be composed of two

> or more entire districts, or parts of two or more districts, to divide one district to form two new districts from the territory therein, to divide one district and attach the territory thereof to adjoining districts, or to change the boundary lines of two or more districts, it shall be the duty of the district clerk of each district affected, upon the reception of a petition desiring such change, and signed by ten qualified voters residing in any district affected thereby, to post a notice of such desired change in at least five public places in each district interested fifteen days prior to the time of the annual meeting, or by notice for same length of time published in all the newspapers of the district; and the voters when, assembled, shall decide such question by a majority vote of those who vote upon such proposition. * * * "

We set forth here your description of the east boundary line of the consolidated district:

> " * the records show the consolidated district to be bounded on the East by the following line beginning at the Southwest corner of the Southeast quarter of the Southeast quarter of Section Sixteen (16) Township Thirty-eight (38) Range Fifteen (15) West; thence run South to the Southeast corner of the Northeast quarter of the Southeast quarter of Section Twenty-one (21); thence run East to the Southwest corner of the Northwest quarter of the Southeast quarter of Section Twenty-two (22); thence run South to the Southwest corner of the Southwest corner of the Southwest quarter of the Southeast quarter of Section Thirty-

> four (34); thence run West to the Southwest corner of the Southwest quarter of the Southwest quarter of Section Thirty-four (34); thence run South to the Southeast corner of the Southeast quarter of the Southeast quarter of Section Sixteen (16) all in Township Thirty-eight (38) and Thirty-seven (37) of Range Fifteen (15) in Camden County, Missouri."

The above description was voted on by the people in the establishment of the East boundary of the Consolidated District. The problem now arising is whether the prior erroneous survey or the present correct survey is to govern the description voted on by the people.

In 11 C. J. S. 635, the rule set forth is as follows:

> "* * * However, a resurvey based upon an original survey which is erroneous is not controlling and where an original survey is erroneous and a new corrective survey is made, the new survey controls."

Cited in support of this rule is Mengel v. Leach, 226 S. W. 883. The court in that case held that where the survey of a portion of the city was erroneous and a new survey was made, the rights as to lots in such portion of the city should be governed by the new, and not the old, survey. We think the present case is analogous to the Mengel case, supra.

CONCLUSION

In view of the above statutory provisions and authorities, it is the opinion of this Department that the lines set by the present geodetical survey should be recognized. It follows, then, that the children mentioned in your request should be allowed to attend school in the Consolidated District.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

TAXATION: Property of handwriting school not exempt from taxation under Art. X, Section 6 of the Constitution of Missouri.

January 12, 1940

1-15

Hon. L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this Department, under date of January 11th, which reads as follows:

"We have in this county one Dr. Bunker who operates a business known as the American Institution of Graphology which carries on a business of analysing a handwriting for fees and also gives a course, I understand, in the art of handwriting. They own real estate and personal property in this county of more or less value and when the Assessor called upon them to assess their property Dr. Bunker informed him that they were an educational institution and that therefore their property was not assessable or taxable. Personally, I feel that the business is purely a racket, however, I doubt there being any way to prosecute them and that they are guilty of any violation of the law, however, I do not feel that they should escape taxes upon the subterfuge of their being an educational institution and I would appre-

ciate an opinion from your office as to the matter in order that they may be placed upon the Assessor's tax books if they be taxable."

In Article X, Section 6 of the Constitution of Missouri certain exemptions from taxation are created. We set forth that constitutional provision:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may exclusively for agricultural or horticultural societies; Provided, that such exemptions shall be only by general law."

Also, in Article X of the Constitution of Missouri, we find Section 7 declaring other exemptions void. That section reads thus:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

61 C. J. pages 392-393, sets forth the following rule of construction to be applied to constitutional grants of exemption from taxation:

> "Unlike the rule of liberal construction which has been generally adopted with reference to exemptions from levy and sale for the payment of debts, an alleged constitutional or statutory grant of exemption from taxation will be strictly construed, * * * "

Cited by Corpus Juris in support of the above rule, are the cases of State ex. rel. St. Louis Young Men's Christian Ass'n. v. Gehner, 11 S. W. (2d) 30, 320 Mo. 1172; St. Louis Lodge No. 9 B. P. O. E. v. Koeln, 171 S. W. 329, 262 Mo. 444, L. R. A. 1915C 694, Ann. Cas. 1916E 784; State ex rel. Mount Mora Cemetery Ass'n. v. Casey, 109 S. W. 1, 210 Mo. 235.

In State ex rel. St. Louis Young Men's Christian Ass'n. v. Gehner, 11 S. W. (2d), 30, the Court said, at page 37:

> "It will therefore be seen that the test for tax exemption is not the number of good purposes to which a building may be put, nor the amount of good derived by the general public in the operation of such purposes, but whether the building is used exclusively for religious, educational, or charitable purposes. If it is used for one or more commercial purposes, it is not exclusively used for the exempted purposes, but is subject to taxation."

From the facts set forth in your request, as we understand them, this American Institution of Graphology carries on a business of analysing handwriting for fees in addition to teaching a course in handwriting.

That being true, and applying the rule of strict construction, it cannot be said that the real property is used "exclusively for schools," within the meaning of Article X, Section 6, of the Constitution of Missouri. It is, therefore, not exempt by reason of that provision.

We are enclosing an opinion rendered by this office to Hon. Lamkin James, Prosecuting Attorney of Saline County, Marshall, Missouri, under date of May 6, 1938, which will answer the question of exemption of the personal property involved in your case.

CONCLUSION

It is the opinion of this Department that both the real and personal property of the Graphology School described in your request is subject to taxation, and is not exempt by reason of the provision of Article X, Section 6 of the Constitution of Missouri.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

Enc.

SCHOOLS:
ELECTION:

(1) No provision in election laws for a challenger for school election.
(2) Elector entitled to vote at annual school election even though he has moved to another state and back again to his original residence.

March 27, 1940

FILED
20

Honorable L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

This Department is in receipt of your letter of March 21st, wherein you request the opinion of this office on certain matters. Your first question is as follows:

I.

"The school board has selected the judges of election pursuant to Section 9341 and these citizens desire to have a challenger present in the voting place and would appreciate your opinion as to their right to have a challenger."

Referring to Section 9341, R. S. Mo. 1929, mentioned in your letter, the contents of which you appear to be familiar with, we note that it contains the clause,

"the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education,"

The statutes provide for challengers and witnesses in certain instances under Section 10270, R. S. Mo. 1929, which is as follows:

> "The county, ward or township committeeman of each party in each county, or the ward committeeman in any city with a population of over 300,000, may appoint two party agents or representatives, with alternates for each, who may represent his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall act as challengers and witnesses to the count of the vote for their respective parties, and have the power prescribed by law."

Bearing in mind that the election is to be conducted in the same manner as state and county officers are elected, yet we cannot construe the terms of Section 10270, supra, as broad enough to cover annual school elections. We are therefore of the opinion that there is no provision in the election laws for having a person acting as a challenger for the coming school election on April 2d.

II.

Your second question is as follows:

> "Citizens of another school district of this county have requested that I obtain your opinion as to the right as to the following individual to vote at the annual school election. The individual a year ago moved his family and belongings, except a small

> part of his household goods, from his farm in Camden County to the State of Kansas where he operated a filling station, however, he did not sell his farm nor did he rent it to any other person and he kept a part of his household goods in the house upon the place. About the 1st of January, his filling station and property burned in Kansas and he moved back to this county and the place he had left. While I realize that the matter of residence is largely a matter of intention, it seems to me that the facts indicate that he has changed his residence and, of course, upon his moving back he has not been a resident long enough to be a qualified voter at the election and I feel that the judges of election would be justified perhaps in refusing him a ballot, however, I would appreciate your opinion upon the matter."

The latest expression of the courts with reference to residence for the purpose of voting is contained in the decision of Chomeau v. Roth, 230 Mo. App. 709, 72 S. W. (2d) 997. The general rule is aptly expressed on page 718, as follows:

> "The fact that the challenged voters were students is in and of itself not at all decisive of the case. Our Missouri Constitution provides in article 8, section 7 (Const., art. 8, sec. 7, p. 677), that for the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or to have lost it by reason of his absence,

while a student of any institution of learning. So the Constitution leaves the student much as it finds him, permitting him either to retain his original residence for voting purposes, or to take up a residence wherever his school is located if he so elects. In other words, mere physical presence at the school is not enough either to gain for him a voting residence at the school, or to cause him to lose his existing voting residence at his home, the whole question, as in all similar situations, being largely one of intention, to be determined not alone from the evidence of the party himself, but in the light of all the facts and circumstances of the case. (Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97; Goven v. Murrell, 195 Mo. App. 104, 190 S. W. 986.)

"The two cited cases, and particularly the former, control this case in all essential respects. As they announce the law, it is entirely possible for a student to gain a residence at the place where he is attending school, although he may have gone there for no other purpose than to attend school, the question of whether a change of residence is effected depending upon the intention with which the removal from the former residence was made. A temporary removal for the sole purpose of attending school, without any intention of abandoning his usual residence, and with the fixed intention of returning thereto when his purpose has been accomplished, will not constitute such a change of

> residence as to entitle the student to vote at his temporary abode. But conversely, an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile. (Nolker v. Nolker (Mo. Sup.), 257 S. W. 798; Finley v. Finley (Mo. App.), 6 S. W. (2d) 1006.)"

In the decision of Lankford v. Gebhart, 130 Mo. 621, which appears to be more on a parallel with the facts which you present, it was held that a person who moved to another state to remain there if he was successful in securing a homestead and to return if he was not, did not lose his residence as a voter though he staked and worked a claim but shortly afterwards abandoned it before filing his claim and he and his family lived in another state for several months before returning to Missouri.

Applying the rule as contained in the Chomeau v. Roth case, quoted supra, the elector's intention can only be gleaned by his own statements, and assuming that he will state that he intends his residence to be in the district in question, then are his acts and actions consistent therewith? You state that he left part of his household goods. It may be that he intended to remain in Kansas only in the event that the filling station was successful.

Under the facts which you present, we are of the opinion that the elector in question is entitled to vote at the annual school election.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

AGRICULTURE:
STATE VETERINARIAN:
DIPPING SHEEP:

State Veterinarian may issue order requiring dipping of sheep.

April 10, 1940

H-11

FILED 20

Department of Agriculture,
Jefferson City, Missouri

Attention: Dr. H. E. Curry,
State Veterinarian.

Gentlemen:

This is in response to yours of recent date wherein you request an opinion from this department on the following statement:

> "I would like to know whether I, as State Veterinarian, have authority to issue an order requiring the dipping of all sheep at public stock yards and auction community sales located within the State of Missouri as a means of controlling and preventing further spread of sheep scab."

The order which you wish to issue and which you enclosed with your request is as follows:

> "Pursuant to authority contained in a proclamation issued by Lloyd C. Stark, Governor of Missouri, on December 22, 1939, relating to the transporting and quarantining of sheep within the State of Missouri and providing for the control and eradication of scabies in sheep, it is hereby ordered that on and after Monday, April ___, 1940, no sheep shall be transported, shipped, driven on foot or in any manner moved from public livestock markets, railway feeding y ards or stockyards and public auction or community auction sales yards located within

> the State of Missouri for purposes other than immediate slaughter at recognized slaughtering plants, to any point within the State of Missouri, unless such sheep are accompanied by an official certificate showing that such sheep have been inspected and found to be free of scabies infection and have been dipped under the supervision of a duly authorized veterinary inspector or agent approved by the State Department of Agriculture or a veterinary inspector or agent of the United States Bureau of Animal Industry."

Following this order, you have set out the solution for the dips which you permit may be used in carrying out the provisions of the order. As stated in a telephone conversation with you, you stated that this solution is one which has been approved by the United States Bureau of Animal Industry and that being the case it would be within the provisions of the Governor's Proclamation dated December 22, 1939.

Referring to the Governor's Proclamation dated December 22, 1939, relative to transporting and quarantining sheep within this state, and upon which an opinion has been rendered by this department holding that the order is legal and within the provisions of Sections 12536 and 12537, R. S. Missouri 1929, as amended, Laws of Missouri, 1939, p. 236-240, I find that the first, second and third paragraphs of the Rules and Regulations, issued in connection with the aforesaid Proclamation of the Governor, provide as follows:

> "First: No sheep shall be transported shipped, driven on foot or in any manner moved from public livestock markets, railway feeding-yards or stockyards, and public auction or community auction sales yars located within the State of Missouri, to any point within the State of Missouri, except

such sheep are accompanied by an official permit or health certificate issued by the State Veterinarian, an authorized Deputy State Veterinarian of Missouri or a Veterinary Inspector of the United States Bureau of Animal Industry, certifying that the sheep are free from scabies and other infectious, contagious and communicable diseases and are not known to have been exposed to scabies.

"Second: All sheep from public livestock markets, railway feeding yards or stockyards, and public auction or community auction sales yards, transported, shipped, driven on foot or in any manner moved for purposes other than immediate slaughter, when declared by the State Veterinarian or his authorized agent as being exposed to scabies, shall be dipped in a Lime and Sulphur dipping solution approved by the United States Bureau of Animal Industry, and such dipping shall be supervised by a duly authorized Inspector of the State Department of Agriculture or an Inspector of the United States Bureau of Animal Industry or its authorized agent.

"Third: All sheep known to be affected with scabies shall be placed under quarantine by the State Veterinarian, and such sheep shall not be released from quarantine until they have been dipped twice ten (10) to fourteen (14) days apart in a Lime and Sulphur dip approved by the United States Bureau of Animal Industry, and such dipping shall be supervised by an inspector of the State Department of Agriculture or an Inspector of the United States Bureau of Animal Industry.

"The State Veterinarian is hereby

> vested with the authority to issue such orders, verbal or written, and to adopt such rules in connection with the enforcement of these regulations as in his judgment or discretion may be deemed necessary for the protection of the sheep industry of Missouri, provided, however, such orders and rules do not conflict with any statutory law of the State of Missouri or any vital rule of these regulations."

It will also be noted that the aforesaid Rules and Regulations were adopted by the Commissioner of Agriculture and the State Veterinarian which comply with the statutes.

Comparing the procedure which you propose to install in connection with the movement of sheep in this state with the provisions of the aforesaid Rules, we think that these provisions would be authorized by virtue of these Rules and especially that part of the second rule which provides that:

> "All sheep from public livestock markets, railway feeding yards or stockyards, and public auction or community auction sales yards, transported, shipped, driven on foot or in any manner moved for purposes other than immediate slaughter, when declared by the State Veterinarian or his authorized agent as being exposed to scabies, shall be dipped * * * "

We think this rule would be meaningless if the State Veterinarian was not authorized to require that such sheep be accompanied by an official certificate showing that they have been inspected and found free of scabies and other infectious diseases and have been dipped as is provided by said order. We are further of the view that this regulation should be adopted by the Commissioner of Agriculture and the State Veterinarian.

CONCLUSION.

From the foregoing it is the opinion of this department that the order number one herein referred to issued by the Commissioner of Agriculture and the State Veterinarian in connection with carrying out their duties as is provided by the Governor's Proclamation relative to transporting and quarantining sheep within the State of Missouri and dated December 22, 1939, is legal and is authorized by said Proclamation and the statutes of this state.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

COUNTY WARRANTS: Mandamus lies to compel county collector to accept warrant together with interest in payment of county taxes.

October 4, 1940

10-8

FILED
20

Honorable L. Cunningham, Jr.,
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We are in receipt of your letter of October 2, 1940, wherein you state as follows:

> "I would appreciate your opinion upon the following matter.
>
> "A certain individual here holds a County Warrant in the amount of $70.00 upon which there is $5.00 interest due. The amount of his county taxes is $75.00; the collector is willing to accept the warrant at its face value but not give credit for the interest.
>
> "I am, therefore, asking your office for an opinion as to whether a person presenting a county warrant for the payment of county taxes is entitled to receive credit for the interest upon the warrant to the date of payment as well as for the face value of the warrant.
>
> "I presume also that the proper procedure for forcing the collector to accept the warrant together with the interest and receipt the tax statement is by mandamus."

In reply to your request we are enclosing copy of an opinion rendered by this Department to Honorable Paul N. Chitwood, Prosecuting Attorney of Reynolds County, under date of October 3, 1938, wherein we held that mandamus was the proper method to compel the county collector to accept lawful warrants that had been presented lawfully to him for the payment of taxes.

With reference to the question of whether interest on county warrants could be considered part of the principal, the court in the case of Hartley v. Nash, 121 S. E. (Ga.) 295, l. c. 296, said:

> "But we think that it is perfectly well settled that the interest is as much a part of any debt as is the principal. Epping v. Columbus, 117 Ga. 263, 276, 43 S. E. 803; Park v. Candler, 114 Ga. 466, 40 S. E. 523. The interest follows the principal and is in the same classification; and if the principal is a valid obligation, then necessarily that portion of the debt usually denominated as interest must likewise be valid and binding."

And again in the case of Americus Grocery Co., v. Pitts Banking Co., 149 S. E. (Ga.) 777, l. c. 779, the court, referring to the same subject, said:

> "This court has held that mandamus will lie to require the payment of county warrants. Maddox v. Anchor Duck Mills, 167 Ga. 695, 146 S. E. 551. Interest upon a valid subsisting obligation of a county is of the same nature as the principal, and is collectible upon the same terms and in the same manner as the principal. Hartley v. Nash. 157 Ga. 402, 121 S. E. 295; Gaston v. Shunk Plow Co., 161 Ga. 287 (6), 130 S. E. 580."

From the foregoing, we are of the opinion that a person presenting a county warrant for payment of county taxes is entitled to receive credit for interest upon the warrant to the date of payment as well as for the face value of the warrant, and that mandamus will lie to compel the county collector to accept the warrant together with interest in payment of the county taxes.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

MW:EG
Enc.

ROADS AND BRIDGES: 1941 revenue cannot be used to take care of 1940 outstanding warrants in the road and bridge and special road and bridge fund; special road districts are entitled to the funds of their districts upon timely application.

November 28, 1940 12/2

FILED 20

Mr. L. Cunningham, Jr.
Prosecuting Attorney
Camdenton, Missouri

Dear Mr. Cunningham:

This department is in receipt of your letter of November 18th, wherein you make the following inquiry: For convenience, we divide your question, the first question being as follows:

> "The Treasurer and the County Clerk, as Budget Officer, have requested that I obtain your opinion upon the following matter.
>
> The Common Road and Bridge Fund of Camden County, Missouri, is at the present time overdrawn approximately $15,000.00. As I understand the law, the Common Road and Bridge Fund does not come under the budget hence the warrants drawn this year will have to be paid in order, out of next year's income.
>
> The County Clerk has refused to sign any more warrants and the County Treasurer has refused to protest such warrants and they desire your opinion as to what their future official acts should be with reference to the warrants which the County Court or districts might desire to draw upon next year's income."

Most of the counties of the state place the funds derived from the Road and Bridge levies under Class 3 of the County Budget Act. However, we have heretofore ruled that the Road and Bridge Fund did not come within the terms of the Budget Act. It does appear that if the county has overdrawn the Road and Bridge Fund to the amount of $15,000, that the County Treasurer is within his rights in refusing to protest further warrants. We think the fact that the Road and Bridge Fund is not considered when formulating the annual budget does not permit warrants to be drawn and paid out of next year's income. It is a well recognized principle of law, insofar as it relates to counties, that the revenue of a current year cannot be used to pay indebtedness of past years. By Section 12, Article X of the Constitution, the credit system as often referred to in relationship to counties was abolished and counties were placed on a cash system, that is, current revenue must be applied to current expenses. We refer you to the decision of State ex rel v. Johnson 162 Mo. 621, l.c. 631:

> "This section then had been the law of this State for twenty years before the adoption of the Constitution of 1875. Prior to that, it was not necessary that a county warrant should be drawn upon a special fund or that it should come to the holder during the year in which the indebtedness was created. What, then, was the effect of the Constitution upon this section? As was ruled in Andrew County v. Schell, 135 Mo. 31, and State ex rel. v. Payne, 151 Mo. 670, that section was modified by the Constitution to the extent that thereafter the warrants drawn by the county court in any year to meet all the necessary and current expenses for that year must first be paid in full in the order of their registration, and if a surplus was left, then the section operated on

all other warrants just as it had previous to the adoption of the Constitution of 1875. In a word, that section, in so far only as it conflicted with the provisions of section 12 of article 10 of the Constitution, became inoperative by force of the Constitution as soon as it went into effect, because inconsistent therewith. But with this exception there is no such repugnancy as requires us to hold it was absolutely repealed, the rule of construction being that before it shall be construed as repealed by implication only, the two must be so repugnant that both can not stand, and, we think, with the modification we have mentioned, both can stand. Such has been the opinion of the Legislature, we think, from the fact that this section has been preserved through three revisions since the adoption of the Constitution. We conclude that this surplus, after the current expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute, section 3166, Revised Statutes 1889, which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, provides the rule of priority just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata."

Other decisions which apply this principle are Trask vs. Livingston County 210 Mo. l.c. 597, and State ex rel Clark County vs. Hackmann 280 Mo. l.c. 696.

We are of the opinion that only the surplus, if any, remaining after the current obligations are taken care of in the Road and Bridge Fund of next year can be used to pay the deficiency or outstanding warrants of this year. Of course, any funds received from delinquent taxes may be used also.

II.

> "The County Court also has the question of the distribution of the money among the various Special Districts which, according to the law as I understand it, is largely within the discretion of the court and they would appreciate your opinion as to whether the whole amount to be so distributed can be retained and applied to the payment of the outstanding warrants. Of course, the districts will cause trouble if the money is not distributed and the banks that hold the warrants are demanding that they be paid."

Special road districts are created by statute with their powers and duties well defined. They are entitled to their funds if timely application be made. In the decision of State ex rel Special Road District vs. Barry County 202 Mo. 279, the court holds to the effect that special road districts are entitled to receive all moneys collected as road taxes within the special road district. We quote, l.c. 290, 291:

> "There was no further expression of the legislative mind with respect to these road-tax provisions until 1917. In that year the road law was recast in part.

Sections 10481 and 10482 as amended by the Act of 1913 were repealed and what are now Sections 10682 and 10683 covering the same subject-matter were enacted. Section 10594 was in no way referred to in the repealing act. It was therefore not expressly repealed, and there is no ground for holding that it was repealed by implication. As already stated it was carried into the present revision as Section 10818. The three sections (10682, 10683 and 10818) as they now stand do not indicate any change of the legislative purpose with respect to the distribution of road and bridge taxes collected upon property within special road districts. Section 10683 provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within <u>any road district</u> shall when paid into the county treasury be placed to the credit of the district from which it arose. Section 10682 which directs the levy of a road and bridge tax in connection with the general levy for county purposes makes no provision for its distribution. But Section 10818, voicing the legislative purpose with respect to special road districts, provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of <u>any</u> . . . <u>law</u>,' upon property within a special road district, shall be set aside to the credit of such special road district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable."

CONCLUSION

We are of the opinion that if the road districts make timely application for the funds legally due their respective districts, that the same cannot be withheld by the county court, and the funds cannot be used and applied to the payment of outstanding warrants.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

AGRICULTURE: Section 29, page 202, Laws of Missouri, 1939, prohibits cream buyers from paying
DAIRY PRODUCTS: a bonus or premium in addition to the posted price; Commissioner of Agriculture may promulgate reasonable rules consistent with the dairy products act.

- -

December 5, 1940

211

FILED
20

Mr. Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

This is in reply to yours of November 28, wherein you request an opinion on the following statement of facts:

> "Section 29 of House Bill 232, Laws of Missouri for 1939, page 202, provides that it shall be unlawful to pay less than the posted prices for cream purchased on a butterfat basis, which prices shall include all premiums and bonuses, if any.
>
> "1. Does this statute prohibit such cream buyers from paying more than the posted price, that is does it prohibit such cream buyers from paying a bonus or premium in addition to the posted price?
>
> "2. Does any other statute of the state prohibit such cream buyer from paying a premium or bonus in addition to the posted price?
>
> "3. Does the Commissioner of Agriculture have power by rules and regu-

> lations to prohibit such cream buyer from paying a premium or bonus in addition to the posted price?"

In order that your question may be more fully discussed, we herein quote the entire section 29 of the Dairy Products Act for the year 1939 as found in Laws of Missouri, 1939, at page 202. This section reads as follows:

> "At each licensed place of business where cream is purchased on a butterfat basis for butter-manufacturing purposes, the delivered prices being offered and paid to milk producers for the different grades upon that day shall be publicly posted in a conspicuous location at each place where cream and butterfat is purchased on grades for said purposes in Missouri, such posting to be made in clear and distinct letters and figures not less than two (2) inches in height, showing the prices per pound of butterfat for the different grades purchased at such place, and it shall be unlawful to pay less than the posted prices, which prices shall include all premiums and bonuses, if any; provided, that nothing in this section shall be construed as to forbid or prevent (a) incorporated co-operative associations from paying annually earned patronage dividends according to the statutes and decrees under which they are organized or (b) corporations paying annual dividends according to the statutes and decrees under which they are incorporated."

The provisions of this section as to the cream buyer paying a bonus or premium in addition to the posted price are very plain and unambiguous. There is no need, or authority, for any construction of this statute since its

language is not ambiguous. In the case of State ex rel. Cobb v. Thompson, 5 S. W. (2d) 57, l. c. 59, the court announced the rule where a construction of a statute was permissible, in the following language:

> "'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'"
>
> Citing cases.

Since said Section 29 provides that the posted price for cream purchased on a butterfat basis shall include all premiums and bonuses, then the cream buyer would be violating the provisions of the act if he paid a bonus or premium in addition to the posted price.

Answering your first question then, it is the opinion of this department that cream buyers are prohibited from paying more than the posted price. In other words, they would not be authorized to pay a bonus or premium in addition to the posted price which they are required to post for the price for cream.

Answering your second question will say that in our research on this question we do not find any other statute which would prohibit such cream buyer from paying a premium or bonus in addition to the posted price.

Answering your third question, Section 8 at page 194, of the dairy products act, Laws of Missouri 1939, provides as follows:

> "The Commissioner is hereby authorized to prescribe and promulgate such reasonable regulations (not contrary to the

purposes of this act) as are necessary to properly enforce this act."

Under this section the dairy commissioner would be authorized to prescribe and promulgate any reasonable regulation necessary to properly enforce the provisions of said section 29 provided such regulations are not contrary to the purposes of said act. The language of this section is plain and unambiguous and needs no construction for the same reasons announced in State ex rel. Cobb v. Thompson, supra.

CONCLUSION.

Therefore, it is the opinion of this department that the Commissioner of Agriculture, under the provisions of said Section 8, of the Dairy Products Act of 1939, may prescribe and promulgate such reasonable regulations as are necessary to enforce the provisions of Section 29 of said Act pertaining to the prohibition of a cream buyer from paying a premium or bonus in addition to the posted price.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

AGRICULTURE:
APPROPRIATION FOR CONTROL OF BANG'S DISEASE:
AUTHORITY OF COMMISSIONER TO ENTER INTO CONTRACTS CONCERNING SAME:
LIABILITY OF THE STATE ON ACCOUNT OF SUCH CONTRACTS:

Under the Act of 1939, Commissioner of Agriculture should make new contracts in regard to control of Bang's disease. Since Legislature made no appropriation for payment for indemnity then the Commissioner would not be authorized to enter into a contract and if he does the State would not be liable thereon.

December 10, 1940.

12-11

FILED
20

Dr. H. E. Curry
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

In reply to yours of recent date, wherein you request an opinion on the following statement of facts:

> "You will recall that the Sixtieth General Assembly passed House Bill 667, which pertains to the control of Bang's disease, also House Bill 716, which illegally sought to enact an appropriation of $10,000.00 for the payment of indemnity on cattle reacting to the agglutination test, under the provisions of Section 12,536-f of House Bill 667, which may be found on page 240, Laws of Missouri, 1939. For your information, we are enclosing copy of opinion from your office relative to this appropriation.
>
> "In view of the fact that owners of Bang's reacting cattle sent to slaughter must sign a waiver agreement with the United States Department of Agriculture, Bureau of Animal Industry, whereby they waive claim to indemnity for reacting cattle sent to

slaughter, unless the State also pays indemnity, the question arises as to whether any liability rests against the State under the provisions of House Bill 667. We are attaching hereto the form of waiver agreement signed by owners of cattle condemned as reactors to the test to Bang's disease.

"Section 12,536-b of House Bill 667 reads as follows: 'within the amounts, which may be appropriated for this purpose, the State may pay such proportion of the indemnity and of the expenses incurred in suppressing or combating such disease under the provisions of this section as shall be determined by and mutually agreed upon with the United States Department of Agriculture, provided, however, that such amounts paid for indemnity on each individual animal by the State shall not exceed the amount paid by the United States.'

"Under the phrasing, 'within the amounts, which may be appropriated to pay such proportion of the indemnity, etc.,' we have taken it for granted that the State has no liability for any alleged 'deficiencies', since there was no legal appropriation for any amount. We especially desire to ask whether there is legal liability for indemnity beyond the amounts appropriated for indemnity.

"Permit reference to Section 12,536-d of House Bill 667, which provides for making an agreement under the act with the United States Department of Agriculture. No such agreement has been made under the new law of 1939, because we had no appropriation under the new law. Is not a new agreement provided for and needed under House Bill 667?"

We note in your request that the $10,000.00 appropriation for the carrying out of the provisions of Section 12536-b, Laws of Missouri, 1939, page 237, was held unconstitutional and void by this department by the opinion referred to therein. That being the case, your department would not be authorized to incur any liability for the enforcement of this act, because it would be in violation of the provisions of the Constitution. We refer you to Section 19, Article X of the Constitution, which provides as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Your authority to enter into such contracts is derived from Section 12536-b, page 237, Laws of Missouri, 1939. This section reads as follows:

> "For the purpose of controlling Bang's disease in neat cattle and cooperating with the United States Department of Agriculture in suppressing and combating Bang's disease, the Commissioner of Agriculture may accept and adopt, on behalf of the State, the

> rules and regulations prepared by the United States Department of Agriculture relating to the suppression of such disease and cooperate with the authorities of the United States in the enforcement of their provisions; or the Commissioner of Agriculture may follow such other procedure as to inspection, condemnation, appraisal, payment of indemnity, disinfection, disposal and other procedure, reasonably necessary in the suppression of such disease, as may be agreed upon and adopted by the Commissioner of Agriculture and the State Veterinarian and the representatives of the United States Department of Agriculture. Within the amounts, which may be appropriated for this purpose, the State may pay such proportion of the indemnity and of the expenses incurred in suppressing or combating such disease under the provisions of this section as shall be determined by and mutually agreed upon with the United State Department of Agriculture, provided, however, that such amounts paid for indemnity on each individual animal by the State shall not exceed the amount paid by the United States."

You will note that the liability of the State is limited to the amounts which may be appropriated for the purpose of carrying out the provisions of said section. Since no money was appropriated, then there can be no liability of the State under this section. This rule is announced in Vol. 59, C. J., at page 300, Section 459, in the following language:

> "A state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent, in its own courts, the courts of a sister state, or, by an individual, in the federal courts. * * * * *"

This rule is followed in Missouri in the case of State v. Bates, 296 S. W. l. c. 420, and announced in Merchants' Exchange v. Knott, 212 Mo. 616, l. c. 647.

In Cassidy v. St. Joseph, 247 Mo. 197, l. c. 205, the Court, in discussing the liability of the State for accounts of its agents, said:

> "Neither the State nor those quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so. * * * * *"

Under Section 12536-d, Laws of Missouri, 1939, at page 238, it seems that the lawmakers contemplated that some sort of an agreement might be entered into by the State of Missouri and the United States Department of Agriculture and the owner of the live stock which might be condemned. This section provides as follows:

> "In lieu of separate agreements between (1) the State and the owner and (2) the United States Department of Agriculture and the owner, the Commissioner of Agriculture is hereby authorized to enter into an agreement with the cooperating agencies of the United States Department of Agricul-

> ture for a joint agreement with the owner of cattle to be tested for Bang's disease, said agreement setting forth the respective undertakings of (1) the State (2) the United States and (3) the owner, provided that the said United States Department of Agriculture shall approve such joint agreement."

This section must be read together with Section 12536-b and, by doing so, it will be seen that no liability on the part of the State of Missouri could be incurred which was without the amounts appropriated for the purpose of carrying out said act.

You state in your letter that this State, under the 1934 agreement with the United States Department of Agriculture authorized the Federal Department to test cattle for Bang's disease and pay federal indemnity only. In view of the fact that the General Assembly of Missouri in 1939 enacted Sections 12536-b and 12536-c, and also Sections 12536-d and 12536-e, under the rules of statutory construction, these sections would be controlling now, and, therefore, the old agreements with the Department would not be applicable.

We have examined the copy of the waiver agreement which you have enclosed, which was used under the 1934 agreement. Since the State of Missouri is not a party to that agreement, and since no appropriation was made by the General Assembly, nor was any legislation enacted authorising an appropriation under the 1934 agreement, then, under the rules hereinbefore announced, the State of Missouri could not be liable on those agreements.

CONCLUSION.

From the foregoing it is the opinion of this department that since no appropriation has been made by the General Assembly to carry out the provisions of said sections

12536-b, 12536-c, 12536-d, and 12536-e, Laws of Missouri, 1939. And since the lawmakers limited the liability of this State to the amount appropriated, then there is no legal liability on the part of the State of Missouri for indemnity which might be incurred by your department signing agreements with the Department of Agriculture and the owner of cattle which might be condemned.

We are further of the opinion that if and when appropriations are made as provided by Section 12536-b that any joint agreements as provided by said Section 12536-d, Laws of Missouri, 1939, should be entered into wherein the State of Missouri, the United States and the owner of animals condemned should be parties.

We are further of the opinion that the Commissioner of Agriculture should not enter into such agreements until an appropriation has been made by the General Assembly, as provided by said Section 12536-b, Laws of Missouri, 1939, page 237.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

COUNTY CLERKS: May not sell insurance covering county property as agent of an insurance company.

December 18, 1940

12-19

FILED 20

Hon. L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We are in receipt of your letter of December 4, 1940, in which you request an opinion from this Department as to the advisibility of your local County Court procuring insurance on county property, through the County Clerk, as agent of an insurance company. While there are a number of statutes prohibiting public officials from becoming interested in contracts which enure to and benefit as individuals, we are unable to find any statute specifically mentioning a county clerk, and it therefore becomes necessary to consider the applicable common law rules.

The general rule concerning this question is stated in Vol. 46 C. J. P. 1037, Sec. 308, as follows:

> "A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public

> officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it. Where two boards are created by statute, one having power to make appointments to another and to supervise its actions, it is illegal for the first board to appoint members of the first board to the second board.
>
> "In the discharge of his duties the officer must be disinsterested and impartial, and he cannot at the same time act in his official capacity and as the agent of one of the public whose interests are adverse to those of another."

In the case of Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857, the court, recognizing the common law rule of public policy, held that an alleged contract between a county court and the presiding judge thereof purporting to employ the aforesaid judge at Five ($5.00) Dollars per day and mileage, was not only void under the expressed terms of Section 2089, R. S. Mo. 1929, but also void as against public policy. The court said as follows: (129 S. W. (2d), l.c. 861)

> "Appellant's alleged contract was also void as against public policy

> regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N. C. 578, 194 S. E. 309; 46 C. J. 1037, Sec. 308."

The North Carolina Case, supra, quotes with approval the following language from Davidson v. Guilford County, 194 S. E. l.c. 313:

> "'Independently of any statute or precedent, upon the general principles of law and morality, a member of an official board cannot contract with the body of which he is a member. To permit it would open the door wide to defraud and corruption. The other members of the board in allowing compensation thus to one of their members would be aware that each of them in turn might receive contracts and good compensation, and thus public office, instead of being a public trust, would become, in the language of the day, "a private snap."'"

In determining whether the situation suggested by you would be against public policy, as above set out, we should consider some of the actual situations which might arise in connection with the

issuance of a policy of insurance, or which would arise in case of a loss within the terms of the policy. The members of the county court are prohibited from entering into contract with the county by Section 2089 R. S. Missouri, 1929.

We know, as a matter of practice, that the county clerk sits with the county court when in session, making a record of the proceedings and it is quite common for him to express an opinion as to some matters before that court for consideration. He is, in a sense, the agent of the court and of the county, for many purposes. He is required by statute to keep the records of the accounts due by, and to, the county. In the event of a loss involving county property, or particularly furnishings or records pertaining to the county clerk's office, the county clerk must necessarily make the proof of loss, placing his valuation on the property destroyed.

In the event of a failure to pay the premium the company, which the county clerk represented as agent, would institute proceedings against the county by service on the county clerk, its own agent. It is possible that some of the conflicts of interest suggested above might not occur, in the event that a contract of insurance was made by the county court with its clerk as agent of an insurance company; but such a contract directly violates the rule laid down in the quotation for C. J., supra:

> "* * * and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. * * * "

CONCLUSION.

It is, therefore, the conclusion of this Department that the issuance of an insurance policy involving county property by the county clerk as agent of an insurance

company is incompatible with his official position as county clerk and opposed to public policy as defined by the common law and judicial decisions of this State.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

COLLECTORS:
SALARIES AND FEES:
COLLECTING DRAINAGE
DISTRICT TAXES:

Commissions allowed collectors for collecting drainage district taxes.

January 13, 1940

1-15

FILED
21

Mr. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following questions:

> "In reference to drainage districts organized under Circuit Courts, will you please advise to whom the penalty is paid under Section 10762 R. S. of Missouri, 1929? Will you please advise me if I am allowed one per cent (1%) commission on current drainage taxes collected and two per cent (2%) commission on delinquent drainage taxes collected?
>
> "I also wish to state here that I am in a County where there is a branch office, and I am allowed 3/4 of one per cent (1%) on all taxes collected, and would like to know if this Section 9901 R. S. of Missouri, 1929, applies to drainage taxes collected by me in this County."

On the question of to whom does the penalty from delinquent drainage taxes belong, we find that Section 10762, R. S. Missouri 1929, provides as follows:

> "All taxes provided for in this article remaining unpaid after December 31st of the year for which said taxes were levied shall become delinquent and bear a penalty of one per cent. per

> month on the amount of said taxes from date of delinquency until paid. In computing said penalty each fractional part of a month shall be counted as a full month."

It will be noted that this section provides for the penalty but does not indicate to whom the penalty shall be paid. Section 9914, R. S. Missouri 1929, provides in part as follows:

> "If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector, after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, of one per cent. per month upon all taxes collected by him after the first day of January, as aforesaid; and in computing said additional tax or penalty, a fractional part of a month shall be counted as a whole month. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: * * "

This section refers to general taxes only. However, it does indicate that the lawmakers did not intend that the collector would be authorized to retain, as a part of his compensation, the one per cent per month penalty.

In the case of State ex rel. White v. Fendorf, Collector of Revenue, 296 S. W. 787, it appears from that case that the collector did not construe the general tax law so that he would be entitled to retain the one per cent penalty provided for in Section 9914, supra.

In King v. Riverland Levee District, 218 Mo. App. 490 at 493, the rule on the authority of an officer to receive compensation is stated as follows:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12, l. c. 27, 149 S. W. 468; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504.) Furthermore our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. l. c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

The collector, in collecting delinquent drainage district taxes, is paid extra compensation by virtue of the provisions of Section 10880, R. S. Missouri 1929, which provides as follows:

> "The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent. of all such taxes collected, and for the col-

> lection of delinquent taxes for such they shall receive two per cent. of all sums collected."

It will be noted that this section allows the collector one per cent additional for collecting delinquent drainage district taxes. Since Section 10762, supra, does not provide for the collector to retain the one per cent per month penalty, and since said Section 10880 pays him one per cent extra for collecting taxes, then it would seem that his full compensation for collecting drainage taxes would be provided for by said Section 10880.

CONCLUSION.

From the foregoing it is the opinion of this department that the collector of revenue would not be authorized to retain the one per cent per month penalty for delinquent drainage taxes collected by him.

We are also of the opinion that the compensation of the collector for collecting drainage district taxes is fixed by said Section 10880, which allows him one per cent commission on current drainage district taxes and two per cent on delinquent drainage taxes.

II.

On your second question on the question of whether or not you are allowed three-fourths of one per cent of drainage taxes collected, we find that Section 9899, R. S. Missouri 1929, provides as follows:

> "In all counties in this state that may now or hereafter have a population of 25,000 and less than 40,000, and in which there is a city of over 15,000 population, more than ten miles distant from the county seat, and in which said city there is a courthouse owned by the county, and in which said courthouse there is held regular and legally established

> terms of a court of common pleas, it shall be the duty of the collector of the revenues of such county to maintain in addition to his office at the county seat a branch office in the courthouse located in the said city of 15,000 population or more, for the convenience of the taxpayers of said county living within the jurisdiction of said court of common pleas."

Section 9900, R. S. Missouri 1929, which is also pertinent to this question, provides as follows:

> "It shall be the duty of the collectors of the revenue of such counties to keep the tax books of such townships as may be under the jurisdiction of said court of common pleas in said branch office, and to keep one or more deputies in said office to attend (to) the duties thereof."

Section 9901, R. S. Missouri 1929, provides as follows:

> "In all such counties where the collector of the revenue is required by this chapter to maintain a branch office as provided herein, he shall be allowed to retain, in addition to the amount now authorized by law, three-fourths of one per centum of all taxes collected to cover the additional expense of maintaining such branch office."

The collector in the counties described in said Section 9899 would be required to maintain a branch office and keep deputies in such branch office for the purpose of collecting any and all taxes including drainage

district taxes. These statutes are plain and unambiguous and since said Section 9901 is all inclusive as to taxes collected it would seem that it would include the drainage district taxes.

CONCLUSION.

It is, therefore, the opinion of this department that in counties where a branch office is maintained as is provided for by Section 9899, the collector of revenue would be authorized to retain three-fourths of one per cent of all taxes collected including drainage taxes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

ROADS:
OVERSEERS:
OBSTRUCTIONS TO HIGHWAYS:

The powers and duties of road overseers in regard to removal of driveways or crossings over ditches connecting highways with private property.

February 1, 1940

2-1

FILED
21

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question of the powers and duties of a township road overseer in regard to the removal of crossings and driveways over ditches connecting highways with private property.

Involved in this question is also the question of whether or not the road overseer, in cleaning out a ditch, destroys and tears up a bridge or culvert leading from the highway on to private property, is it the obligation and duty of the land owner to replace the bridge or culvert at his own expense, or is it the duty and obligation of the road overseer to do this.

Pertaining to the powers and duties of road overseers in such question, I find that Section 7932, R. S. Missouri 1929, provides as follows:

> "All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts. Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the

> sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day of (if) such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

Section 7874, R. S. Missouri 1929, is also pertinent to the question and it provides as follows:

> "It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds at his command will permit. He shall at all times conform to the plans and specifications and instructions of the county highway engineer for the character of the work in question."

In speaking of the implied powers of the overseer,

by virtue of the foregoing sections the Supreme Court, in The State ex rel. Faires v. Buhler, 90 Mo. 560, 568, said:

> "Section 6941, of chapter 147, supra, provides, among other things, that: 'The several county courts shall divide their counties into convenient road districts, and shall appoint a road overseer for each district, and furnish him with the boundaries thereof, and, at the February term of the court in each year, the court shall appoint a suitable person in each district to act as overseer for the next ensuing year. * * It shall be his duty to keep the roads in his district in good repair, according to the provisions of this chapter. * * * ' Other sections point out specific circumstances under which he may be ordered by the county court to remove fences and other obstructions from public roads, none of which, however, have any application to the case at bar. It may also be concluded that, under the general power conferred by section 6941, supra,--'to keep the roads in his district in good repair'-- that it was the duty of defendant, as such overseer, to remove any and all fences and other obstructions, if any, from any of the public roads in his said district."

It would seem from the ruling in the above case that under the general powers conferred under the foregoing sections that it is the duty of the overseer to remove any and all obstructions from any of the public roads in use in his district. The foregoing sections refer to road overseers under the general road law.

Since your county is under township organization

if there is any special law applicable to townships, then that must prevail over the foregoing general statute. Section 8149, R. S. Missouri 1929, which applies to road overseers in counties under township organization, provides as follows:

> "All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organizations, or in conflict with the provisions of this law."

And Section 8156, R. S. Missouri 1929, which is a part of the road law as it applies to counties under township organization, provides in part as follows:

> "(a) It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds as his command will permit, * * * * * * * * * * * * * * * "

The provisions of Section 7932, supra, indicate that the driveways or crossings from private property to the public road shall be built and constructed under the supervision of the road overseer. The language of this section also indicates that the lawmakers intended that the individual who constructs such a driveway or crossing must assume responsibility therefor; that is, he must bear the expenses thereof and if it has obstructed the highway in any manner, he is guilty of a misdemeanor, and if he fails to remove such crossing or driveway after having been given notice thereof, he is liable for the payment of five dollars per day for each day he permits the same to remain.

The powers and duties of the road overseers are statutory and, of course, must look to the statutes for whatever authority they exercise by virtue of holding that office.

While the case of The State ex rel. Faires v. Buhler, supra, indicates that the overseer has implied power to remove obstructions from the highway, yet we

think the lawmakers, by the special provisions of Section 7932, supra, have set up a procedure for the road overseer to pursue in case a person obstructs a highway ditch by placing a crossing or driveway across it so that he stops the free flow of water along the ditch. If after the road overseer has pursued that course, then if the obstruction is not removed, under the Faires case, supra, he would be authorized to remove the same.

In the absence of a statute authorizing the road overseer to replace a crossing or driveway across a road ditch, we think he would have no authority because such an expenditure would fall in the class of paying out public funds for private purposes which is prohibited by Section 46 of Article IV of the Constitution of Missouri.

By Section 7932, supra, the lawmakers have apparently contemplated that the crossing and driveways across road ditches may be constructed under the supervision of the road overseers. It seems that when such a course is pursued, then the controversy between the property owner and the overseer would not arise. Of course, if a road overseer is acting arbitrarily and insisting on the removal of a crossing or driveway which does not obstruct the highway, the party complained against could set that up as a defense in the action authorized under said Section 7932, in which case it would be a question of fact whether or not the crossing or driveway obstructs the ditch. If it is found that the ditch is obstructed, then under said Section 7932, the owner of the driveway or crossing would be liable for the penalties provided thereunder.

CONCLUSION

From the foregoing it is the opinion of this department that in removing obstructions from road ditches the overseer is required to follow the provisions of Section 7932, R. S. Missouri 1929, before he would be authorized to remove such obstructions himself.

We are further of the opinion that if the

road overseer removes a driveway or crossing leading over a ditch to the public highway that there is no duty or obligation upon him to replace the same and that he would not be authorized to expend public funds for that purpose.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

CRIMINAL LAW: Under Section 4304 R. S. Missouri, 1929 venue of criminal action in county or state where property was obtained. Under Section 4305 R. S. Missouri, 1929 venue in county or state where check was drawn, uttered or delivered.

April 3, 1940

H-9

FILED
21

Hon. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 30, 1940, which reads as follows:

"I would like your opinion on a matter of considerable importance here in Bates County. It pertains to the application of Section 4304, 4305, and 4306, revised Statutes of Missouri, 1929 with particular reference to checks. Under my construction of these sections I am taking the position that the offense of giving a no-funds or an insufficient funds check is committed at the place where the check is given regardless where the bank is located and regardless of the residence of the parties to the transaction. In other words I have acted under the assumption that the fraud, if any was committed, when the check passed hands and was received by the payee or indorsee.

However, we have a great many cases in which a check is written in the State of Kansas or some other state, placing in an envelope and mailed to a man living here in Bates County. The check may or may not be drawn on an out of state bank. In that case, I confess that I do not know where the offense is committed but I would

presume that a prosecution could be had at the place where the check is actually delivered, as well as, at the place where the check is mailed. From another class of cases we have here in Bates County, merchandise is sold by a man living in Missouri to a man living in Kansas. The check is given by the Kansas man while he is in Kansas and is drawn on a bank in Missouri, assuming the check is refused by the bank in which it arises, whether prosecution can be begun in Missouri or must be begun in Kansas where the check was actually written and turned over to the payee. The laws of Kansas make any check over $20 a misdemeanor regardless of whether it was a no-funds or insufficient funds check. In Missouri, of course, a no-funds check is a felony regardless of the amount of the check. That is why the matter became somewhat important.

I would like your opinion on how broad a construction may be placed upon the above named sections and whether or not you feel that a check made in Kansas and mailed to a man in Missouri creates an offense in Missouri and whether it would be possible to file prosecution on a check given in Kansas on a Missouri bank."

Section 4304 R. S. Missouri, 1929, reads as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation or statement or pretense, or by any other means or

> instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

It will be noticed the above section is entitled cheats, frauds, bogus checks, etc., but is the main section under which actions of obtaining money under false pretenses are filed. In construing this section, we are enclosing an opinion rendered January 25, 1940, to Arkley Frieze, Prosecuting Attorney of Dade County.

I

Section 4304, supra, provides a penalty for the fraudulent attempt to obtain or obtaining money, property or valuable thing. If the information or indictment brought charging that the defendant obtained money, property or valuable thing, the crime is not committed until the money, property or valuable thing has been surrendered. The venue of the cause of action is in the county where the money, property or valuable thing is surrendered to the defendant. It was so held in the following cases:

In the case of State v. Schaeffer, 89 Mo. 271, l.c. 280, the court said:

> "We entertain no doubt that the place

where the money or goods, are obtained, without regard to where the representations were made, is the place where the party should be prosecuted."

Also, in the case of State v. Lichliter, 95 Mo. 402, l.c. 408, the court said:

"It is contended by counsel that, under the facts disclosed by the evidence, the criminal court of the city of St. Louis had no jurisdiction of the case, but that defendants should have been indicted and prosecuted in Jasper county, and in support of this contention has cited the case of State v. Schaeffer, 89 Mo. 271. The indictment in that case was founded on section 1561, Revised Statutes, and it is there held that as the money obtained by the fraudulent representation was paid to Schaeffer's agent in New York, the offence, if any, was committed in New York, for which a prosecution in Missouri could not be maintained. That case, so far from sustaining the contention made, overthrows it, for in it the case of Norris v. State, 25 Ohio St. 217, which is analogous and on all fours with the case in hand, is approvingly cited and quoted from. There the defendant was a resident of Clark county, and by fraudulent representations as to his solvency, contained in a letter sent by him to the Akron Sewer Pipe Company, located in Summit county, induced said company to ship him by rail to Clark county a lot of sewer pipe; he was indicted in Clark, where he received the pipe sent by railroad by the Sewer Pipe Company, but the Supreme Court held that the crime was committed in Summit county, remarking: 'That the weight of authority is clearly that the railroad company was the agent of defendant for receiving the goods at Akron

> and carrying them to Springfield, and the delivery to it by the Sewer Pipe Company was, in legal contemplation, a delivery of the goods to defendant at Akron.'"

You ask in your request if it would be possible to file prosecution on a check given in Kansas on a Missouri bank, and whether it is possible to prosecute in Missouri on a check made in Kansas and mailed to a man in Missouri. In answer to most of this inquiry I am referring you to the opinion rendered to the Hon. Arkley Frieze which is enclosed. The prosecution under Sec. 4304, supra, would depend on all of the facts and circumstances.

In the case of State v. Gritzner, 134 Mo. 512, l.c. 526, the court said:

> "It seems quite apparent, from the language of the statute, that there is no intimation therein contained that it was intended to operate extra-territorially (even granting such power in the legislature thus to make it operative). Indeed, it appears very obvious from section 3933 that the offense cognizable by it and its associate sections is one perpetrated alone and punishable alone within our borders.
>
> Furthermore, the offense, if one was committed, was committed alone within the jurisdiction of the sovereignty of the state of Illinois. One state can not, speaking generally, 'provide for the punishment, as crimes, of acts committed beyond the state boundary, because such acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done.' Cooley's Const. Lim., supra.

> Now, no offense certainly was committed until and unless communication was established between the mind of defendant and the brokers in Chicago, towit, when the telegram reached that point, because, until that juncture, no offer to buy or to sell or otherwise agree could have been made.
>
> In a word, the case stands here, conceding the reception of the telegrams, as if defendant in Slater had spoken to his brokers in Chicago over a long distance telephone, when of course but one opinion could be entertained as to the locus where the offer was made, and consequently the crime committed. And it has been ruled in this state, as well as elsewhere, that a person can not be punished in this state where the offense was actually consummated in another state, even though some act constituting a part of the offense, or making the offense possible, was committed within this state. State v. Shaeffer, 89 Mo. 271; Works, Courts & Jurisdict. 470, and cases cited."

Also in the case of ex parte Hammond, 59 F. (2d) 683, l.c. 685, the court said:

> "* * * It has been held that the offense of obtaining money under false pretenses is committed, if and when and where the victim parts with his money as a result of the false pretenses. This was the view expressed by the California District Court of Appeals in People v. Chapman, 55 Cal. App. 192, 196, 203 P. 126, 128, where the court said: 'Without doubt, the crime of obtaining money or property by false pretenses is consummated at the place where the money or property is obtained from the defrauded person, regardless of where the false pretenses may have been made,

> and therefore the place where the money or property is obtained is the place where, ordinarily, the venue should be laid. People v. Cummings, 123 Cal. 269, 55 P. 898. In State v. Shaeffer, 89 Mo. 271, 1 S. W. 293, the defendant, who was prosecuted in the Missouri court for obtaining money by false pretenses, had drawn a draft in that state on the bank account of the drawee in New York; the money being collected through the agency of two other banks in New York and Missouri, respectively. It was held that the money was obtained in New York; that therefore the crime was consummated in that state and not in Missouri; and that, as a consequence, the Missouri court had no jurisdiction.'
>
> The rule is similarly stated in Bishop's New Criminal Law, p. 55, vol. 1, ch. VI, sec. 110. The rule is thus stated in Ford v. U. S., 273 U. S. 593, 47 S. Ct. 531, 540, 71 L. Ed. 793:
>
> '"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power" (Strassheim v. Daily, 221 U. S. 280, 31 S. Ct. 558, 55 L. Ed. 735.)
> * * * *.'"

If a check should be mailed to a resident of the state of Missouri and nothing was obtained on the check, although the check was a bad check, no crime would be committed in the state of Missouri, for the reason that the attempt to commit the crime was not consummated in the state of Missouri. It was so held in the case of State v. Block, 62 S. W. (2d) 428, l.c. 431, where the court said:

> "In other words, unless Oleatha Jones agreed to participate in the fraud, there can be no crime charged against this respondent, because Oleatha Jones had a right to abandon the criminal attempt originated by this respondent. There is no allegation in the indictment that Oleatha Jones had agreed upon the plan to defraud this insurance company. It would certainly be necessary for her to participate in the plan leading towards its commission. Respondent had no authority to settle this claim for Oleatha Jones or to do anything on her behalf in the settlement of this claim. The indictment further fails to allege that the agents of the insurance company had agreed to the settlement of the claim for the amount asked by respondent, or in fact for any amount. All the indictment alleges is the mere presentation of the claim with an offer or demand of settlement for a sum certain, and, even with a criminal intent, that would not constitute a crime. At best, the indictment alleges a mere preparation to commit a crime where no overt act is alleged to have been done in the consummation after such preparations."

In prosecution of crimes committed under Sec. 4304, supra, the venue is in the state or county where the crime was consummated, but where an attempt has been made to commit a crime under Sec. 4304, supra, and was not consummated the venue of the attempt would be in the state or county where the attempt commenced and not where it was supposed to have been consummated. It was so held in the case of State v. Terry, 109 Mo. 601, l.c. 622, where the court said:

> "The charge in the case at bar is not of a consummated crime, but of an attempt to commit the crime. Such attempts are

cognizable in the place where made. No. 1 Wharton on Criminal Law, 9th Ed. secs. 195, 288. The venue of the offense, was therefore, properly laid as being in this state."

CONCLUSION

In view of the above authorities and enclosed opinion, it is further the opinion of this office that where a check is made in Kansas and mailed to a man in Missouri, where money, property or other valuable thing is obtained from a man in Missouri, the crime of obtaining money under false pretenses under Sec. 4304 has been committed and the venue of the crime is in the state of Missouri. Of course all of the elements of obtaining money under false pretenses must be proven as set out in the enclosed opinion to the Honorable Arkley Frieze.

It is further the opinion of this department that it makes no difference where the bank is located, for the reason that the check is only known as evidence of the trick and deception and is considered as a means, instrument or device used in the confidence game. The question of where the bank is located does not enter into the elements of obtaining money under false pretenses under Sec. 4304, supra.

II

Section 4305 R. S. Mo., 1929, reads as follows:

"Any person who, to procure any article or thing of value, or for the payment of

> any past due debt or other obligation of whatsoever form or nature, or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment."

Section 4306 R. S. Mo., 1929, reads as follows:

> "As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depositary, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, (together with the drawee thereof the amount due thereon), together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

Section 4305, supra, provides for the criminal prosecution of one who draws money, writes a check or utters a check upon a bank in which he has an account but whose account is insufficient to cover the check. This section differs from Sec. 4304, supra, in that under Sec. 4304, the defendant must be charged with not having any money in the bank upon which he uses the check as

a false or bogus check with intent to cheat and defraud. Under Sec. 4305, supra, it is only a misdemeanor and under Section 4306, supra, the prima facie evidence of an intent to defraud if the check has not been made good within five days after receiving a written notice that the account was insufficient to cover the check. In your request you inquire if it is possible to file a prosecution on a check given in Kansas on a Missouri bank. I am presuming that you desire to know whether a check given in Kansas on a Missouri bank which is insufficient can be prosecuted in Missouri. The gist of the action, under Sec. 4305, supra, is the drawing, uttering or delivering of the check and if the check is given in Kansas on a Missouri bank it would not be a violation of Sec. 4305, supra, in Missouri, for the reason that the venue on the giving of the check would be in Kansas and not Missouri. In the case of State v. Felman, 50 S. W. (2d) 683, l. c. 684, the court said:

> "There are several reasons why the demurrer of the evidence should have been sustained. As will be observed from a reading of section 4305, the check, draft, or order must have been uttered with intent to defraud, knowing at the time of such drawing that the drawer has not sufficient funds in, or credit with, such bank or other depository."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the venue of an action under Sec. 4305 and 4306, supra, is in the county or state where the defendant drew, uttered or delivered, with intent to defraud, any check, draft or order.

It is further the opinion of this department that if a resident of Kansas gives a check to a resident of Missouri, on a Missouri bank, which is insufficient and the check is drawn, uttered or delivered in Kansas there can be no criminal prosecution in the State of Missouri under Section 4305 R. S. Missouri, 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

TAXATION : 1. Form of Deed approved by State Tax
AND REVENUE: Commission proper.
2. Collector shall execute such deeds.
3. Two or more lots sold to same purchaser or purchasers all such parcels shall be included in one deed.

May 7, 1940.

5-9

FILED
21

Mr. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Mr. Dalton:

We are in receipt of your letter of April 29th requestion an opinion, which, in part, reads as follows:

"I want to especially call your attention to the fact that on third sales at that time, a certificate was issued which was required to be held for two years, as the redemption period was still effective under the law existing at that time.

"Mr. Rendlen objected to the feature of the deed, which reads that he paid the full amount of taxes at the sale, which he says he did not, and therefore, it is not a proper recital in the deed, he contends.

"I am, therefore, asking you to please issue me a formal opinion from your department, stating whether or not I can issue deeds under a 1937 sale conveying more than one tract, and if in your opinion, would it be permissible for me to let a purchaser write his own deed, which would be termed as a Collector's deed."

"Again Thanking you for your courtesy and prompt attention to this matter, I am,"

1. The deed form prepared by this department and submitted to the State Tax Commission and which was approved by said Commission, under the provisions of 9960d, Laws of Missouri 1933, page 443, is in part as follows:

> "WHEREAS, the said_____, in addition to his bid, has paid all taxes due and unpaid on said lands which have become due and payable on same since the date of the taxes included in the advertisements for sale for said lands; and,"

Section 9957c, Laws of Missouri 1933, page 440, is as follows:

> "Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, and such subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding by depositing with the county collector the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase and draw interest at the rate specified in said first certificate but not to exceed ten percent per annum from the date of payment. Said

> holder of a certificate of purchase permitting a subsequent certificate to issue on the same property, shall, on notice from the county collector, surrender said certificate of purchase on payment to him of the redemption money paid by the subsequent purchaser." (Underscoring ours)

Section 9957, thereof, is in part as follows:

> "If no person shall redeem the lands sold for taxes within two years for the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, the accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, * * * . In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

CONCLUSION

Therefore, it is the opinion of this department that the recital in said deed is proper. That the collector shall execute the deed approved by the State Tax Commission but that "in making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same

person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

SVM:LB

TAXATION: Construction of Classes One, Two and Three of Sec. 183, R. S. Mo. '29 - the sale of tax certificates and the delivery of collector's deed is not affected by the administration of estates.

November 26, 1940

12-9

FILED
21

Hon. George O. Dalton
Collector
Marion County
Hannibal, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 19, 1940, which reads as follows:

> "Will you please advise me as to the following matter? There are two instances in this County where the real estate owner died, and his estate was being administered in the Probate Court, this being all of his assets. The funeral director presented his bill for allowance and payment in the Probate Court, and while the estate was being administered, the tax certificate in the meantime had been issued and ripened into title and the Collector's deed was issued on the same, which of course, excluded the undertaker from the payment of his debt against the estate.
>
> "Now, does the fact that the estate is being administered and a claim to be allowed by the Court, should this prevent the sale for delinquent taxes or the issuing of a Collector's deed upon a certificate which has become title.

> "I also understand that the undertaker's claim has priority over the State's claim for taxes."

We call your attention to Article 10, Sections 6 and 7, of the Constitution of Missouri, which read as follows:

> "Sec. 6. Property exempt from taxation. The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

> "Sec. 7. Other exemptions void. - All laws exempting property from taxation, other than the property above enumerated, shall be void."

From the reading of these two sections, it will be noted that the Constitution plainly sets forth the only lands in the State of Missouri that are exempt from taxation.

Section 139 R. S. Missouri, 1929, provides as follows:

> "If any person die leaving land encumbered by mortgage or deed of trust, or any lien whatever, or owning any equity of redemption, or leaving mortgaged or pledged any personal property, and shall not have devised the same or provided for redemption thereof by will, the court shall have power, if, in its judgment, it will promote the interest of the estate and not be prejudicial to creditors, to order the executor or administrator to redeem the same out of the personal assets of the estate, or to order the sale of other real estate to redeem such land or personal property so encumbered, and also to order the executor or administrator to mortgage or pledge any personal property of the estate in his hands for the purpose of raising and providing the money with which to redeem said premises so encumbered."

It will be noted in the above section that if any person dies, leaving land encumbered by mortgage or deed of trust, or any lien whatever, or owning any equity of redemption . . . the court shall have power, if, in its judgment, it will promote the interest of the estate and not be prejudicial to creditors, to order the executor or administrator to redeem the same out of the personal assets of the estate, . . . Clearly this Section gives the probate court the authority to order the executor, or administrator, to redeem, if there is a proper showing made to the court by any person interested or who has a claim before the court.

Section 306 R. S. Missouri, 1929, provides in part as follows:

> "When any person having title to any real estate of inheritance, or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following course: * * "

It is clearly the intention, and has been many times held, that real estate, upon the death of the owner, passes immediately by operation of law to his, or her, heirs, or, in case of a will, would pass according to the terms and tenor of the will, whereas, personal property passes to the deceased' legal representative, subject, in each case, to the payment of the deceased' debts. (Armor v. Lewis, 252 Mo. 568.)

Section 182 R. S. Missouri, 1929, provides in part as follows:

> "All demands against the estate of any deceased person shall be divided into the following classes:
>
> I. Funeral expenses.
>
> II. Expenses of the last sickness, wages of servants and demands for medicine and medical attendance during the last sickness of deceased; also reasonable cost of tombstone if allowed by court.
>
> III. All debts, including taxes due the state or any county or incorporated city or town; and it shall be

> the duty of the executor or administrator to pay all such taxes without any demand therefor being presented to the court for allowance: **Provided**, that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except where he is in possession of the realty under an order of the court. * * "

Therefore, from the reading of the aforesaid sections, the conclusion is obvious that the persons deceased, whom you described in your request, were the owners of land which was subject to be taxed by the State of Missouri, and those taxes having been levied, and not having been paid, the liens created by the assessment of the taxes were by law perfected through statutory tax sale and tax certificates sold in compliance therewith, and, even though during the interim of the time that the title was ripening the owners became deceased and their estates were administered upon, the executor, (or administrator - as the case may be), could have been ordered by the probate court to have redeemed the equity of redemption that was held by the deceased during his, or her, lifetime; but, due to the fact that the title of the land, or, in the instant case, the equity of redemption, passed to the heirs of the deceased by operation of law, then the only persons who could redeem would be the heirs, except, however, upon an order being procured from the judge of the probate court, as is provided in Section 139, supra, and the land thereby redeemed by the executor or administrator in compliance with the order, but apparently this was not done, and the equity of redemption was allowed to ripen into a title and the purchasers of the several certificates were allowed to procure deeds from the collector of the county wherein the land was sold, which, if the sales and all things were properly done, under the Jones-Munger Act the

holders of the deeds have the fee simple titles. Therefore, the heirs of the deceased ceased to have an equity of redemption, and the probate court having failed to make an order upon the administrator or executor to redeem these lands the undertaker, (referred to in your request), is now precluded from receiving any benefits, even though it might have been possible to have worked out something for him, if the procedure outlined heretofore had been followed.

Section 182, supra, (even though the funeral expenses are set out and classified in Class One, and the taxes classified in Class Three,) does not give him any particular pecuniary right, and it will be noted in Class Three that it provides that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except, where he is in possession of the realty under an order of court. In other words, there is no duty upon the administrator to pay the taxes on real estate or to redeem any land that is in the process of being sold for taxes. (See Graham v. Wilson, 185 S. W. 1160).

CONCLUSION.

In conclusion, it is our opinion that even though valid undertaker's claim had been allowed in the probate court, that this in itself does not prevent the sale for delinquent taxes, or the issuing of a collector's deed upon a certificate which has become title.

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

BRC:RW

MUNICIPAL CORPORATIONS: To disincorporate a city of the
ELECTIONS : fourth class, petition must contain two thirds of qualified voters and not two thirds of registered voters.

January 24, 1940

1-25

FILED
22

Hon. C. W. Detjen
County Counselor
St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 19th, 1940, which reads as follows:

> "The County Court has asked me to request an opinion from you as to the meaning of the term 'legal voters' as used in Section 7065 R.S. Mo. 1929, pertaining to the disincorporation of fourth class cities, as applied to St. Louis County in the light of the permanent registration laws pertaining to that County.
>
> "Under the permanent registration act of 1935, page 230, Section 2, it is provided that in order to vote, a person with all the other necessary qualifications must be registered in his voting precinct, and the provisions of Section 8, Laws of 1939, page 398, seem to apply the Act to voters in incorporated cities, although not to unincorporated villages.

"In one case pending before the County Court, involving the disincorporation of a fourth class city, the evidence to date seems to indicate that there are in excess of 1500 persons qualified to register under the provisions of Article 8, Section 2 of the Constitution and the general statute relating to qualifications of voters, Laws 1939, page 382, Section 10178, but that possibly only as few as 800 or so of them are actually registered. If the term 'legal voters' as used in Section 7065 is interpreted to mean those persons who have all the necessary qualifications to register and vote, then 1000 or more names are required on a petition to disincorporate, while if the term 'legal voters' means those persons who actually had a right to vote at the time the petition was filed, as duly registered voters, then only about half as many names are required on the petition.

"One side of the controversy in the cause at present pending in the County Court takes the position that all persons qualified to register are legal voters under the meaning of Section 7065, whether registered or not, while the other side takes the position that it was the intention of the legislature to leave the matter of disincorporation to the decision of those persons who are legally qualified as registered voters, i.e., the only ones, for example, who could determine the matter of disincorporation if it were left to a vote of the people rather than to the judgment of the County Court. The latter group further contends that the intention of

> the legislature is indicated by the fact that in proceedings to incorporate an unincorporated town or city under Section 6095 it is necessary that a majority of the taxable inhabitants join in the petition, because it is those who will be taxed, rather than those who are qualified to vote, who will be materially affected by the incorporation; while in the case of disincorporation, there being no increase of taxes involved, the decision is left with those persons who have a right as registered voters to take part in the municipal government."

Section 7065 R. S. Missouri, 1929, reads as follows:

> "The county court of any county in which a city of the fourth class is located shall have the power to disincorporate such city upon petition of two-thirds of the legal voters of such city. No city of the fourth class shall be disincorporated by virtue of this section, unless notice has been given of the intended application for such disincorporation, by advertisement published in some newspaper published in the city prayed to be disincorporated, for four weeks successively prior to such application, and if no newspaper is published in said city, then by advertising in the newspaper in such county nearest to such city; and such advertisement and notice shall contain a copy of such petition and the names of the petitioners."

It will be noticed under the above section that the petition for disincorporation must bear the names of two-thirds of the legal voters of such city.

Your request is for an opinion as to whether or not the two-thirds of the legal voters described in Section 7065, supra, means two-thirds of the registered legal voters, or two-thirds of the voters who are qualified to vote and who have not registered.

Qualifications of voters, which does not mean registered voters, is set out in Section 10178, Session Laws of Missouri, 1939, page 382, and reads as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people; Provided, each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides; provided, further, no idiot, no insane person, and no persons while kept in any poor-house at public expense, except the Soldiers' Home at St. James and the Confederate Home at Higginsville, or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of

> suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

It will be noticed under the above section that nothing is said as to the registration of the citizen, but only as to the qualifications of the citizen. It has been held that the term "legal voters" does not mean "registered voters."

In the case of Sayman v. Becker, 269 S. W. 973, l.c. 974, the court set out the facts in that case as follows:

> "The petition alleges the act in question was passed by the Fifty-First General Assembly, and that within 90 days thereafter petitions purporting to be signed by 5 per cent. of the legal voters in each of eleven congressional districts were left for filing with the secretary of state, and the secretary 'thereupon duly found' the numbers of petitioners necessary for each of the districts, in order to make up 5 per cent. of the legal voters, to be stated numbers; that the number required in the Twelfth district was 2,317; 'that thereafter defendant Charles U. Becker, as secretary of state, filed the said referendum petitions after counting the names thereof, and finding the same were signed by the following number of legal voters' in eleven designated congressional districts. The numbers

> given show more than enough in each district named. The number of legal signers in the Twelfth district, found by the secretary, is alleged to be 3,521. (The referee found 3,523 signatures.) The steps thereafter taken preparatory to submission are then alleged, and there is no allegation of irregularity in these. It is then alleged the secretary made his findings from the faces of the petitions and without other knowledge of the facts."

The court further said at page 978:

> "* * It is to be kept in mind, also, that the expert affiants seem to proceed upon the assumption that every petitioner must have been a registered voter. This assumption is not correct either in fact or law. * * "

Also, in the case of State v. Sullivan, 224 S. W. 327, l.c. 340, the court said:

> "In our judgment the words 'legal voters,' as used in section 57 of our Constitution, does not mean registered voters.
>
> "Registration does not add to or detract from the qualifications of a voter. Such laws could not do so without doing violence to the Constitution. Such laws are but reasonable

> regulations for the orderly exercise of the constitutional rights of suffrage. They are intended to and do apply solely to the exercise of the constitutional right of sugfrage, and not to the exercise of any other right which a legal voter may exercise. That these registration laws are mere police regulations applicable to the act of voting only is made clear by the cases. In State ex rel. v. Mason, 155 Mo. loc. cit. 506, 55 S. W. 642, this court approved the following from the text of Judge Cooley. * * ."

The above case is based upon the opinion in a New York case entitled In Re: Herman, 108 App. 335, 96 N. Y. 144, in which the court said:

> "'Objection is also made that the signers upon some of the petitions are not registered voters. I do not think it was the intention of the statute to require that an elector or voter should be registered in order to join in a certificate of independent nomination. And while the words "voter" and "legally qualified voter or elector" are used in different places, it may be fairly said to embrace a legally qualified voter. Without necessarily including his registry at the particular election, he must be legally qualified as an elector or voter at general and special elections within his district. But if he should neglect to register, and does not think that that is a qualification of an elector as used in the Constitution and funda-

> mental statute of the state, and unless it would clearly appear that a statute regulating the conduct of elections intended to go to the disqualification of any particular elector or class of electors, such regulation ought not to limit the constitutional right of a voter. The statute was intended for the orderly conduct of elections, and not for the purpose of preventing citizens discharging their ordinary duties. It should be so construed as to permit such voters and electors as are recognized by the Constitution to take part in all the preliminaries of an election, and it is not necessary that he should declare his intention to vote at the election, or that he should actually intend to vote. It follows, therefore, that the objection to those signers that were not registered is not well taken.'"

And, in further case of the case of State v. Sullivan, supra, the court said in commenting upon the opinion in the In Re: Herman, supra, as follows:

> "In other words, the registration laws are police restrictions on the exercise of the voting privilege, and are not restrictions upon any other privilege granted by the organic law. As we view it, if the signer is otherwise a legal voter, the fact that he is not at the time of signing registered is not a bar to his right to sign either an initiative or a referendum petition. The trial court erred in holding that the petition was not sufficiently signed in the Fifth and Fifteenth congres-

sional districts."

CONCLUSION

In view of the above authorities, it is the opinion of this Department that in order to disincorporate any city of the fourth class it is mandatory that the petition for disincorporation filed with the county court must contain and bear the names of two-thirds of the qualified voters of said city, and if there is more qualified voters in said city than there are registered voters, then two-thirds of the registered voters would not be sufficient for the county court to proceed upon the disincorporation of such city.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

MUNICIPAL CORPORATIONS: No vacancy is created in office until officer's resignation is accepted, construction of statute 6973 R. S. Missouri, 1929.

RESIGNATION OF COUNCILMAN:

January 15, 1940

1-18

FILED
23

Hon. Paul J. Dillard
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

We are in receipt of your request for an official opinion, under date of January 11, 1940, together with a statment of facts thereto attached. Your question and statement of facts is as follows:

QUESTION

"Is the appointment of Claude O'Dell, by the mayor, on December 4th, 1939, to fill the vacancy created by the resignation of Alderman Elmer Holman July 19, 1939, in conformity with Ordinance No. 151 of the City of Lebanon, Missouri, and in conformity with Section 6973 R. S. 1929 (on which said ordinance is based) and as such appointee can he legally serve on said Board or should such vacancy created by the resignation of Alderman Elmer Holman, since it occurred more than six months prior to the general Municipal election in said City, towit: April 1940, have been filled, if at all, by special election?"

STATEMENT OF FACTS

"Lebanon, Missouri is and was at all times herein mentioned a Municipal Corporation and City of the Fourth Class.

"At the regular Municipal Election held in said City in April 1938 Elmer Holman was duly elected as Alderman of the Second Ward. On May 2, 1938 he took the oath of office, qualified and from and after that date duly served on the Board of Aldermen until the 19th day of July, 1939 at which time he filed with the City Clerk the following resignation:

'July 19, 1939.

'Honorable Mayor and Board of Aldermen, City of Lebanon, Missouri.

'I hereby tender my resignation as Alderman from the Second Ward of the City of Lebanon, Missouri.

'To be effective from this date.

Elmer Holman,
Alderman.'

"On the same date, to-wit: July 19, 1939 the above resignation was read by the City Clerk, at a regular meeting of the City Council, to the Mayor and Board of Aldermen, and a minute made thereof.

"No action accepting or rejecting the resignation was taken by the Council but there is no ordinance of the City of Lebanon, designating or requiring

any action to be taken on presentation of a resignation of an elective officer of the said City.

"The said Elmer Holman from and after the said July 19, 1939 never attended any meeting, sat as a member of the Council nor did he after that date take any part whatever in any meeting of the Council. Neither did he, after said date, accept any pay as an Alderman. He actively ceased all connection as a member of the Board of Aldermen on said date.

"At the time that his resignation was read to the Council, the City Clerk informed the Mayor and Board of Aldermen, that under the City Ordinance, since this resignation occurred more than six months prior to the next general Municipal Election in said City, that in order to fill a vacancy, that a Special Election would have to be called.

"No action was taken by the Board of Aldermen to call a special election, and none was called or had and the seat of Alderman Holman remained vacant until the 4th day of December 1939 when the Mayor of the City of Lebanon, Missouri appointed Claude O'Dell as a member of the board of Aldermen and as Alderman from the Second Ward to fill the vacancy created by the aforesaid resignation of Alderman, Elmer Holman.

"The Ordinance that the City Clerk had reference to when he advised the Mayor and the Board of Aldermen on July 19th, 1939, at the time the resignation of Alderman Holman was read, is Ordinance No. 151 of the Ordinances of the City of Lebanon, Missouri, and which said Ordinance had been duly adopted and passed and was in

> full force and effect at the time. A certified copy of said Ordinance is herein enclosed and made a part of this statement.
>
> "The said Claude O'Dell, under the purported appointment made by the Mayor under date of December 4th, 1939 took oath of office, and has participated in one adjourned and one regular meeting of the City Council, acting in the capacity as an Alderman from the Second Ward.
>
> "The minutes of the meetings of the City Council show that there were objections made to his appointment prior to the time that he took oath of office or participated in any meeting of the Council."

A public office may be abandoned. Abandonment is a species of resignation; resignation and abandonment are voluntary acts. The former is a final relinquishment to the non-user. See McCall v. Cull, Ariz. 75 P. (2d) 696, Words and Phrases, 4th Ed. ___.

In the case of Commonwealth ex rel. Wootton, (Ky.) Attorney General v. Berninger, 74 S. W. (2d) 932, the Court said:

> "At the regular election held in the year 1933, Berninger was elected one of the commissioners of the city of Newport for a term of two years. Within the proper time he qualified by taking the necessary oath and executing the required bond, and entered upon the duties of his office on the first Monday in January, 1934. Thereafter, he attended the regular sessions of the board of commissioners and performed the duties of his office until January 30, 1934. On that day the board was in regular session

and he submitted to the board the following communication signed by him and addressed to the mayor and city commissioners: 'Accept my resignation as City Commissioner to be effective on this date, January 30, 1934.'

"On the reading of the communication by the clerk it 'was laid over indefinitely' by unanimous vote. No further action on the communication was taken by the board until its regular session held on March 13, 1934. Berninger was present on that occasion and presented and had read a communication stating in substance that he had been informed that his resignation was not effective for the reason that it had never been accepted by the board, and no successor was appointed or qualified to fill the office, and that he desired to withdraw the resignation, giving as his reasons the fact that his health had been restored by his recent vacation; that if his resignation became effective, it would mean considerable expense to the city in holding an election in November; and that he had received many communications from the business organizations of the city and petitions signed by many citizens of the community requesting his return. For these reasons he felt honor bound to continue in the office and perform the trust imposed upon him by the voters of the city. The communication was received by the board and ordered filed and spread upon its minutes. No further action was taken by the board. By reason of these facts the resignation was never accepted by the board or any officer, and no vacancy in the office ever existed or was attempted to be filled."

And the Court further said:

> "* * * the resignation of a public officer does not become effective until accepted by the proper authority, or by equivalent action, such as the appointment of a successor. Tabor v. Webb, 227 Ky. 611, 13 S. W. (2d) 758; Patrick v. Hagins, 41 S. W. 31, 19 Ky. Law Rep. 482; Schaklett v. Town of Island, 146 Ky. 798, 143 S. W. 369, Ann. Cas. 1913C, 602; 46 C. J. 978, Sec. 129, note 40.
>
> *
>
> "Nor are we impressed with the argument that an officer has the absolute right to resign when he pleases, and that our rule infringes this right. The basis of the rule is that the right of the incumbent is subordinate to the right of the people to the maintenance of an orderly government. An able discussion of the question is found in the following language of Mr. Justice Bradley in Edwards v. United States, 103 U. S. 471, 473, 26 L. Ed. 314:
>
> *."

This being a case in which the officeholder filed his resignation but the same was not accepted, and the Court held:

> "As Mr. Berninger's resignation never became effective by acceptance or otherwise, it follows that he had the right to withdraw his resignation and resume the duties of his office."

We set forth this case to show that the court's have ruled that the formal filing of a resignation is not enough where a person holds a public office and has the responsibility of carrying out the function and operation of government and maintaining public order, and that he still holds his office until his resignation is accepted, or in light of the above decision he would have a right to withdraw his resignation before the same had been formally accepted by the authorities who were by statute designated to accept the same.

In the case of Tabor v. Webb, et al. (Ky.) 13 S. W. (2d) 758, which statement of facts and opinion of the court we are herein setting out very fully due to the fact that we feel that you will not perhaps have this case before you. We hold that this case clearly states the law and is applicable to the situation and the statement of facts as set forth in your request. The Court said:

> "On July 25, 1928, Milton Haywood and W. R. De Hart resigned as councilmen, stating in their resignations that they were to be immediately effective. At least one of these resignations was published in a local newspaper on August 2, 1928. The next regular meeting of the city council after these resignations were written was August 6, and on that day the council met, but, because the records were not on hand, they adjourned to meet again on August 13, at which date they accepted the resignations of Haywood and De Hart, and elected Dr. B. F. Morgan and Walter Abbott in their stead.
>
> "One of the principal questions in this case is whether the resignations of Haywood and De Hart became effective on July 25, the date they were written, on August 6, the date they could have been accepted, or on August 13, the date they

were actually accepted, because, if these resignations did not become effective until accepted, then Abbott and Morgan were appointed less than three months before the election in November, 1928, and would therefore hold their places until the regular election in November, 1929, whereas, if these resignations became effective on the date they were written, July 25th, or August 6th, the date they could have been accepted, then these vacancies occurred more than three months before the November election, and they are vacancies which should be filled at that election. The answer is that there is no vacancy until the resignation is accepted. See Patrick v. Hagins, 41 S. W. 31, 19 Ky. Law Rep. 482; Shacklett v. Town of Island, 146 Ky, 798, 143 S. W. 369, Ann. Cas. 1913C, 602. This is the general rule, in the absence of a statute on the subject. 46 C. J. 978, Sec. 129, Note 40. The reason for this rule is well stated in Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314. It follows that the only vacancies to be filled were those of mayor and a councilman to take the place of W. H. Scott.

"Certain parties had nominated what they call a 'Citizen's Ticket' and put in nomination three men for councilmen, Freeman S. Webb, C. S. Cartee, and E. A. Garber. Of these, Cartee led the ticket, and received 395 votes. Certain other citizens nominated what they call the 'Independent Ticket.' They only nominated one candidate for councilman, and that was the appellant, Floyd Tabor, who received only 223 votes. There was only one vacancy to be filled, to fill that, C. S. Cartee was elected. The positions held by Dr. B. F. Morgan

> and Walter Abbott could not be filled at the November election, 1928. Unless they have resigned, they are still legal councilmen of Olive Hill."

In the case of United States v. Green, 53 Fed. 769, l. c. 770, the facts were as follows:

> "Mayor's office, Lathrop, Mo., Mch. 28, 1889. By call of the mayor, a special meeting of the city council was held this date. Mayor in the chair. Alderman all present. The call for convening council was read and filed. M. A. Goff, Prest. of the board of aldermen, and alderman from the First Ward, tendered his resignation, which, upon motion, was accepted, to take effect upon adjournment. Wm. McK. Lowe, alderman from the Second Ward, tendered his resignation, and, upon motion, the same was accepted, to take effect upon adjournment. H. M. Freeman, alderman from the Second Ward, tendered his resignation, and, upon motion, the same was accepted by the mayor, to take effect after adjournment. J. C. Bohart then tendered his resignation as alderman from the First Ward, which, upon motion, was accepted by the mayor to take effect after adjournment. Council then, upon motion, adjourned sine die."

And the court held upon this statement of facts as follows:

> "The resignation may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact, to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor."

and the holding was made having Section 5 of Article XIV of the Constitution of Missouri before the court, which said Section 5 of Article XIV reads as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

See also Section 6951, R. S. Missouri, 1929 and Section 6973, R. S. Missouri, 1929.

Therefore, in the light of these sections and the cases herein set forth, one is forced to the conclusion that when Elmer Holman, the duly elected and qualified alderman tendered his resignation as of June 19, 1939, as is set forth in this opinion, and that the same was tendered by the City Clerk at a regular meeting of the City Council to the Mayor and Board of Aldermen and a minute made thereof, but no action was taken at that time by said body, that said paper writing was nothing more than a tendered resignation and when the mayor failed to call a special election, which he without doubt had a right to do, because of the fact that said

tendered resignation was at a date which was more than six months before the date of the general election, that there was no formal acceptance of said attempted or tendered resignation in the light of the authorities. We are further forced to the conclusion that when the interim of time elapsed and no action having been taken by the mayor, or any person exercising the duties of mayor, and there remained a period of time which was within six months of the general election, then the last subdivision of Section 6973 R. S. Missouri, 1929, became controlling in the situation for the statute provides that no vacancy in the office of alderman which may occur within said six months preceding a general municipal election, shall be filled in such a manner as may be prescribed by the ordinances.

Turning to the statement of facts and ordinances as certified by Ralph Shafer, City Clerk of Lebanon, Missouri, we find that the city had this ordinance:

> "Section 12. When a vacancy occurs in any Elective office, within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the Mayor, or the person exercising the duties of Mayor, by appointment. This section shall apply to the members of the Board of Aldermen, the same as any other elective officers."

Thus, following Section 12 of Ordinance No. 151, we conclude under Section 6973, supra, that the city had a right to create and pass that part of the ordinance which is designated as Section 12. This being true, and the further fact being that the resignation of Elmer Holman, Alderman, still being before the city council, and having not been acted upon and the further fact being as shown by the statement that Elmer Holman had failed and refused since June 18, 1939 to attend any meetings had as a member of the council, or to take any part whatever in a meeting of the council after the said date, that the vacancy of Elmer Holman

could be filled according to the terms of Section 6973, supra, and the authorities interpreted similar sections in different jurisdictions as are taken by this office as controlling and authority.

CONCLUSION

Therefore, in conclusion, this office is of the opinion that Claude O'Dell is the duly appointed and acting alderman of the City of Lebanon, Missouri.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:RV

INSANE: Costs of transportation to State Hospital chargeable to county or patient's estate.
SHERIFF: Fees of Sheriff for transportation of insane person to hospital.

February 14, 1940.

2-16

FILED
23

Honorable Paul J. Dillard
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Dillard:

This will acknowledge receipt of your letter of February 10, 1940, in which you request an opinion from this office as follows:

> "I will appreciate it if you will give me the answers to the two following questions at your convenience.
>
> 1. One, M. H. Claiborn was charged in Laclede County with having made and executed a fraudulent chattel mortgage. The jury's verdict was 'not guilty by reason of insanity and that the defendant is still insane'. Upon this verdict the Circuit Judge committed M. H. Claiborn to a state hospital for the insane. The criminal costs of the case were paid, but the sheriff has not been paid for delivering Claiborn to the state hospital. Claiborn, although charged and tried in Laclede County, was a resident of Pulaski County. Following the case of Thomas, Treas., v. Macon County, 74 S. W. 999, 175 Mo. 68, I directed the Sheriff to submit his bill to Pulaski County, but that County Court would not pay the bill. It is my contention that the County of Pulaski owes this bill because it was incurred on behalf of an

> insane person and a resident of Pulaski County. I will appreciate it if you will advise me in this connection.
>
> 2. A number of the Special Road Districts in Laclede County, and Laclede County is not under township organization, have been submitting their itemized accounts of expenditures. These expenditures show that the Special Road Commissioners are working themselves and, of course, they expect pay for themselves, and are paying themselves from the alloted money for their district. I am familiar with that section that provides Special Road Commissioners shall serve without pay, but the QUES-TION IS - does this section apply only to the administrative feature of the job or does it prohibit them from securing pay as day laborers on roads within their special road district, when they actually perform the labor?
>
> "I will appreciate it if you will give me your opinion on these two questions."

In regard to your first question, the statement of facts in your letter is rather brief. There are several sections of the statutes pertaining to persons of unsound mind who have been tried on criminal charges and acquitted by reason of insanity and found to be still insane. In Article 11, Chapter 29, R. S. Mo. 1929, dealing with criminal procedure, are found Sections 3657 and 3660 inclusive, and in Article 2, Chapter 46 are found Sections 8655 to 8662 inclusive. These sections are not in conflict, but the ones contained in Article 2, Chapter 46, cover the matter more in detail and the ones touching your question are herein set out:

> "When a person, tried upon indictment for any crime or misdemeanor, shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in

their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such sanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with as provided in the two following sections."

"SECTION 8656. If the prisoner is not a poor person, and the court is satisfied, from the nature of the offense or otherwise, that it would be unsafe to permit the prisoner to go at large, an order shall be entered of record that he be sent to a state hospital, designating it, and further requiring the sheriff or other ministerial officer of the court, with such assistance as may be specified in the order, to convey such prisoner to the hospital, after first ascertaining from the superintendent that such prisoner will be received into the hospital, and until the receipt of such information, to keep such prisoner in the county jail, poorhouse or other safe custody; and further, that the cost which may accrue in carrying into effect this order, and all expenses for the support and maintenance of such person whilst in the care and custody of the officer and at the hospital, shall be paid out of the proceeds of the estate of such person. And the court shall have power, at each succeeding term, to tax up, so long as

it may be necessary, such cost and expenses as may have accrued since the preceding term, and cause the same to be levied and collected by execution; and the officer collecting the same shall pay to the treasurer of the hospital, and to such other persons as may be entitled thereto, their respective amounts due. The clerk of the court shall furnish a copy of the order of the court, under his official seal, to be lodged with the superintendent, upon the admission of the prisoner into the hospital, and issue a warrant upon said order to the officer named in said order as near as may be of the form specified in Section 8649."

"SECTION 8657. If the prisoner be a poor person, the court shall make an order remanding him to the custody of the sheriff or other officer of court, requiring him to hold the prisoner in safe custody, at the expense of the proper county, until the county court shall cause him to be removed to a state hospital, as in the cases of insane poor persons: Provided, no examination into the insanity of the prisoner shall take place before the county court, as provided in sections 8643, 8644, 8646, and 8647; but the county court and clerk thereof shall proceed, and the prisoner be dealth with in like manner as other insane poor persons are required to be, after examination had by the county court. It shall be the duty of the clerk of the court trying the prisoner to make out a copy, under his official seal, of the judgment of acquittal of the prisoner, and the order required by

the first part of this section, to be delivered to the officer having custody of the prisoner for his authority for such custody."

"SECTION 8662. To the sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the clerk, mileage going and returning, at the rate of ten cents per mile, and seventy-five cents per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the sheriff, or other person acting under the warrant of the clerk, mileage at the rate of eight cents per mile for going and returning shall be allowed; the computation in both instances to be made from the place of arrest to the hospital, by the nearest route usually traveled. The costs specified in this section shall be paid out of the county treasury of the proper county."

Section 8656 provides for the maintenance at the State Hospital of the person committed out of the funds of the person. Section 8657 provides for the cases of insane poor persons. Neither of these sections provide for the committing of an insane poor person by the Circuit Judge.

Section 8656 provides for the order committing a person adjudged not guilty by reason of insanity, who has property, and the payment of the cost of transportation and maintenance out of his property.

Section 8657 directs the method of procedure in the case of insane poor persons who are found not guilty by reason of insanity and are further found to be still insane. And provides that such person shall be remanded to the custody of the sheriff or other officer of the court to be held in safe custody, at the expense of the <u>proper</u> county, until the

county court shall cause him to be removed to a state hospital. And further directs the county court and clerk, thereof, to proceed in like manner as other insane poor persons are dealt with after examination.

Section 8649 authorizes the county clerk, after judgment of insanity, to make out warrant for the conveyance of such poor person to the state hospital.

Section 8662, as amended in the Laws of 1933, at page 408, provides for the compensation of a Sheriff for transporting this class of insane patients to the state hospital.

CONCLUSION

It is the conclusion of this department that, under your statement, either Pulaski County, if the said M. H. Claiborn is an insane poor person, should pay the expense of his transportation, or it should be borne by his own estate, but Pulaski County is not authorized to pay the fee of your Sheriff under the circumstances. The order, committing the said Claiborn and directing his transportation by the county court of the county of his residence, not having been made.

Relative to your second question, you will find enclosed an opinion written February 11, 1939 to the Honorable Herbert H. Douglas, Prosecuting Attorney of Newton County, by Harry H. Kay, Assistant Attorney General, covering that question.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

WOJ:LB
Encl.

CRIMINAL COSTS: In conviction for manslaughter under murder indictment the county is liable for the costs and not the state.

February 21, 1940

2-21

FILED
23

Hon. Paul J. Dillard
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated February 19th, 1940, which reads as follows:

"The above named was charged in Laclede County, Missouri, with Murder in the First Degree and he entered his plea of not guilty to that charge.

"Matthews was first tried in Laclede County and the result was a hung jury. The second time he was tried was in Phelps County and the jury found him guilty and assessed his punishment as Five Years in the State Penitentiary. This was appealed and reversed on an instruction from the Court. The above named, in the third trial, was again found guilty, but of manslaughter and his punishment was assessed at $100.00 fine and three months in jail.

"This cost bill was certified to the state auditor's office and that office refused to pay under the decision of State ex rel v. Carpenter, 51 Mo. 555.

"It is my contention that the Auditor's Office is wrong and that the costs should be paid by the state under and by authority of State V. Hackmann, 257 SW 457; wherein the Court held that who should pay the costs was determined by the indictment and the plea to that indictment."

Section 3826 R. S. Missouri, 1929, partially reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, work-house or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * * "

Under the above section the state is only liable where the defendant has been convicted in a capital case or where the defendant shall be sentenced to imprisonment to the penitentiary, except in cases where the person convicted is under the age of eighteen years. The last and final case construing the above section was the case of State ex rel v. Carpenter, 51 Mo. 555, the court, in that case said:

"Although the indictment was for a

> capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review. * * * "

Although the above case was passed upon in the February Term of 1873 it is the last case in point and has not been overruled. This case specifically holds that the sentence establishes the grade of the offense for the purpose of fixing the liability for costs and specifically holds that in such a case which is similar to your case the county and not the state must pay the cost.

In citing the case of State ex rel v. Hackmann, 302 Mo. 273, 257 SW 457 section 3826, supra, is not construed, but said case construes section 3828 R. S. Missouri, 1929, which reads as follows:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in

> which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

The holding in State ex rel v. Hackmann, supra, was to the effect that although the court had given instructions on manslaughter, nevertheless the defendant was subject to a conviction of murder in the first degree, which is a capital offense. The court in holding that the state was liable on an acquittal wherein the instructions contained an instruction on manslaughter, yet the facts were such that the question of manslaughter was not pertinent to the case and the defendant was thereby acquitted of a capital case and not of manslaughter.

Section 3827 R. S. Missouri, 1929, reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

The above section must be referred to as to the payment of costs when the facts are not covered by section 3826, supra. Under section 3827 it is mandatory that the county shall pay the costs when the defendant is sentenced to imprisonment in the county jail or to pay a fine under any indictment. Of course neither the state nor the county is liable for the costs where the defendant is able to pay the costs.

CONCLUSION

In view of the above authorities, it is the opinion of this department that where a defendant is found guilty under indictment charging murder in the first degree, and is sentenced on an instruction of manslaughter to three months in jail and a One Hundred Dollar fine, the cost in such a case must be paid by the county and not by the state.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

THE STATE:
MUNICIPAL CORPORATIONS:

Arms of the state government are not bound by ordinances of municipalities pertaining to zoning districts.

February 6, 1940

2-8

FILED
26

Mr. Roy Ellis, President
Southwest Missouri State
Teachers College
Springfield, Missouri

Dear Sir:

This is in reply to yours of February 1, 1940, wherein you submit the question of whether or not zoning ordinances of the City of Springfield apply to structures erected on the college campus of the State Teachers College.

The question involved here is whether or not a city may, by ordinance, regulate the construction of buildings in that city by an arm of the state government. There is no question but that the State Teachers College is a branch of the state government of the State of Missouri, and that the same rule applies to buildings of that college as to any other state building.

In our research on this question, we find in Volume 59 Corpus Juris, page 166, paragraph 278, the rule is stated as follows:

> "The legislature has power to provide for the acquisition of public buildings for the use of the state. Thus it may authorize the construction of a state house or other public building, subject to any limitation placed by the constitution on this power, or it may buy or rent buildings for the use of the state, or place its public buildings in the custody of trustees for it."
>
> "* * * On the construction of a

building for state purposes, under state authority, the state is not required to obtain a permit in accordance with the city ordinances."

We do not find where such a question has been before our courts, but in the case of City of Milwaukee v. McGregor, 121 N. W. 642, the Supreme Court of Wisconsin, in a case in which a similar question was involved, the court said:

"* * * The building in question is to be for public use as state property. The situation is the same as if the structure was to be used for the care of the insane or for any other of the many state purposes which might be named. The fact that the board is made a state agency to take and hold title to property for state purposes does not cut any figure in the matter. The building is not designed to be, in any proper sense, the property of the board, except as representing the state.

"So the question comes down to whether the ordinary charter and ordinance regulations of a city requiring submission to local supervision, as regards the manner of constructing, altering and repairing buildings, have any application to state buildings. That must be answered in the negative. It is plainly so ruled by the familiar principle that statutes, in general terms, do not apply to acts of the state. Moreover, express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith. * * * * * * * * *

"Applying the foregoing, it is plain

> that the assumption by the building inspector of the city of Milwaukee of authority over the state agent in the execution of the statutory command to build the structure in question according to plans approved by the Governor, was an unwarranted interference--a pure, but not intentional, of course, usurpation. The state was not only not expressly included in the charter power of regulation, but the general law of the state passed subsequently to the enactment of the charter quite plainly commanded the Board of Regents to erect the building without regard to the judgment of any one outside of its own members, except as to approval of the plans by the Governor."

CONCLUSION.

Applying the foregoing rules, it is the opinion of this department that the zoning ordinances of the City of Springfield in regard to erection of buildings on the college campus of the Springfield State Teachers College do not apply to such buildings.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

STATE TAX COMMISSION: POWERS and duties of the State Tax Commission in regard to the enforcement of the revenue laws.

January 15, 1940

FILED 27

State Tax Commission of Missouri
Jefferson City, Missouri

Attention: Mr. Clarence Evans, Chairman

Gentlemen:

This is in reply to yours wherein you submit the following questions:

> "1. Can the State Tax Commission, or its chairman, or its members, institute in the name of and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the State in matters of taxation and revenue, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary, and also, can the Commission, or its chairman, or its members appear and interplead, answer or defend, in any proceeding or tribunal in which the State's interests are involved in matters of taxation and revenue, and, in execution of said powers, call upon the Attorney General, Prosecuting Attorneys and Circuit Attorneys of the State?
>
> "2. What actions can the State

> Tax Commission, or its chairman, or its members, institute for the removal of officers, under the revenue or taxation laws, who may be guilty of misfeasance or malfeasance in office?
>
> "3. Can the State Tax Commission or its chairman, or its members, file writs of certiorari in causes to which it is not a party, or in ex parte proceedings, where the interests of the State are involved in matters of taxation and revenue, according to the theory as expressed in 4 Corpus Juris Secundum, 197, and State ex rel. Shartel v. Westhues, 9 S. W. (2d) l. c. 617?
>
> "4. Can the State Tax Commission, or its chairman, or its members, appear in tax litigation to which it is not a party, and be heard or file briefs as amicus curiae on taxation matters public in their character?
>
> "5. With respect to the power of the Attorney General, in the enforcement of the taxation and revenue laws, are the powers of the State Tax Commission concurrent and co-extensive?"

The sections of the statute which relate to the foregoing questions on taxation are as follows:

Section 9820, R. S. Missouri 1929, provides as follows:

> "The commission shall familiarize itself with all the sources of income provided by law for the state and its political subdivisions, and shall have power to investigate and supervise the

> work of administrative officers affecting finances, to the end that the law affecting sources of public revenue shall not be laxly enforced nor their use impaired."

Section 9854, R. S. Missouri 1929, provides in part as follows:

> "It shall be the duty of the commission, and the commissioners shall have power and authority, subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state, as follows:
>
> "(1) To have and exercise general supervision over all the assessing officers of this state, over county boards of equalization and appeal in the performance of their duties, and to take such measures as will secure the enforcement of the provisions of this article, and all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed in accordance with the letter and plain provisions of the law.
>
> "(2) To confer with and advise assessing officers as to their duties under this article and all other laws concerning revenue and taxation, and to institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations and individuals

> failing to comply with the provisions of this article, or of the revenue and taxation laws. In the execution of these powers the said commission shall call upon the attorney-general, or any prosecuting or circuit attorney in the state, to assist this commission in the enforcement of laws with the supervision of which this commission is charged, and when so called upon it shall be the duty of the attorney-general, and the prosecuting (or circuit attorneys in their respective counties), to assist in the commencement and prosecutions of actions and proceedings for penalties, forfeitures, removals and punishments for violation of the laws in respect to the assessment and taxation of property, and to represent the commission in any litigation which it may wish to institute or in which it may become involved in the discharge of its duties.
>
> "* * * * * * * * * * * * * * * * * * *"

Section 11276, R. S. Missouri 1929, is pertinent to the questions here and it provides as follows:

> "The attorney-general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear

> and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

On the question of the powers and duties of the attorney general and prosecuting attorneys to institute and defend actions in which the public interests are involved, the St. Louis Court of Appeals in the case of State v. Pioneer Creamery Co., 245 S. W. 361, 362, said:

> "Section 9793, (1919) which has been upon the statute books of this state since 1891, prescribes the penalty for the failure of corporations doing business in this state to comply with certain requirements imposed upon them by law, and makes it the duty of the Secretary of State to report to the prosecuting attorney of the county in which the business of such corporation is located, and requires the prosecuting attorneys to institute proceedings to recover the fine therein provided for.
>
> "Section 9793, supra, has not been specifically repealed by any act of our Legislature, nor do we think it can be said that it has been repealed by implication.
>
> "Section 736, R. S. 1919, which was section 1007, R. S. 1909, provides that the prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the

state or county. This has, in substance, been the policy of this state since 1825. In 1872, the Legislature abolished the office of circuit attorney, and provided for the election in each county of a prosecuting attorney.

"Section 696, R. S. 1919, makes it the duty of the Attorney General to institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity necessary to protect the rights and interests of the state, and to enforce all claims against any and all persons or corporations in whatever court such action may be necessary. This, in substance, has been the law since 1868. The history of this legislation, as well as a discussion of the powers and duties of the prosecuting attorneys in this state, may be found in State ex rel. v. Lamb, 237 Mo. 437, loc. cit. 451, 141 S. W. 665, loc. cit. 669, wherein it is said:

"'Whatever may be the proper construction of section 970 as to the duties of the Attorney General, it is clear that during all the time since the early territorial days the local state's attorney has been the proper legal representative of the state to institute proceedings in behalf of the state, and in no respect has that power been curtailed by legislation. In a strict historical sense, the prosecuting attorney represents the state and exercises powers analogous to those exercised by the Attorney General in England.'

"In State ex rel. Wear v. Springfield Gas & Electric Co. (Mo. App.) 204 S. W. 942, it was held that a prosecuting attorney had the right to maintain an action in a court of equity on behalf of the state to enjoin a nuisance. But the court also stated (204 S. W. loc. cit. 946):

"'We do not wish to be understood as indicating that we think that the authority to institute and prosecute a cause of the character with which we are now dealing is exclusively in the prosecuting attorney. Section 970, R. S. 1909, would, in our judgment, authorize the Attorney General to institute on behalf of the state equitable proceedings to enjoin the destruction of fish in the manner set out in plaintiff's petition,' etc.

"In addition to the specific direction contained in section 9793, supra, it would seem to be the general policy of the state, as evidenced by its legislative enactments, that the prosecuting attorney is the proper officer to institute the proceedings in question, even though the Attorney General may possess similar powers and authority. * * * * * * * * * "

From the foregoing ruling it seems that the state's attorney is the proper legal representative to institute and defend actions in which the state and general public are concerned. In State ex rel. Laclede Land & Improvement Co. v. State Tax Commission of Missouri, 243 S. W. 887, the Supreme Court of this state discussed the powers and duties of the tax commission as are prescribed in Section 9854, supra, and at l. c. 888, it is said:

"The state tax commission is a nondescript when it comes to the assessment of property. The power to assess property is fixed in named officers under the law, and, unless the Tax Commission Act repeals that law, such commission cannot assess property. To rule that such Tax Commission Act (article 4 of chapter 119, R. S. 1919) repealed the law as to whom the duties were imposed on as to the assessment of property would be preposterous. No agency of the state has considered that such commission has been given such power. The language of the act itself (save some loosely drawn sections, or parts of sections) indicates no such purpose. After the assessment the law provides that there shall be certain county agencies to fix and determine the wrongs committed by the assessor. To hold that these agencies were disturbed or superseded by the Tax Commission Act would likewise be preposterous.

"The Tax Commission Act contemplates that such commission may, in a proper manner, see that these several agencies empowered to assess property perform their duties, but it does not contemplate that such commission perform their duties for them. True it is that such commission may take evidence as to inequalities of assessments, but this is for the sole purpose of advising the state board of equalization. What information, that the tax commission gathers by authority of law, it can give, and should give, to the state board of equalization. The state board of equalization cannot act upon individual discrepancies in the

official work of its subordinate officers, nor can the tax commission (a mere advisory commission for the state board of equalization) go further. The tax commission may gather facts to assist the state board of equalization in determining whether or not the county property has been assessed properly as in comparison with other counties in the state. The decision of the state board of equalization is the finality of an assessment. This because the Constitution (article 10, section 18) so lodges it. No law can deprive this board of its constitutional right to ultimately determine the equalization of property assessments as between the counties. If, after the state board had acted (as in this case), the tax commission could change the assessments, then the constitutional board must yield to a mere statutory board. This is unthinkable. Be it remembered that in this case the relator is asking the tax commission to act after the state board of equalization has acted, because relator avers the previous action of the state board of equalization.

"The act creating the tax commission will be read in vain, if the view is to be taken that it contemplated an interference with the previous methods of assessing and equalizing the assessments of property. In the act there is no indication that the lawmakers intended that property should be assessed other than by assessors named by previous laws, nor is there in the act intimation that such commission should be the final judica-

tory to pass upon the individual cases of irregular or wrongful assessments. The tax commission was formed for a purpose, as indicated by the law. Its purpose was advisory as to taxation, and as to other things not here necessary to discuss. It was authorized to see that the laws pertaining to revenue were enforced, but it was not authorized to assess, or equalize assessments. These were left (where the Constitution contemplates) with the local agencies, giving to the commission the power to see that the laws were enforced. Giving the commission the power to see that the laws were enforced does not mean that it can usurp any of the functions of the bodies over which it has supervision. The assessment of property has a fixed meaning in our laws. It includes the act of the assessor, and the boards thereafter authorized to review his acts. Ultimately, when these agencies are through with their work, the state board of equalization (constitutional in authority) completes the assessment. We conclude that there is no authority in law for this tax commission to interfere with any of the agencies of assessment, from the assessor to the state board of equalization. They can gather information for the information of the latter board, and see to the enforcement of the laws, but not otherwise. As a personal unit in the assessment of property, such board has no power. We would rather put this case upon the broad ground than upon the more restricted one. The acts of this tax commission in all cases are merely advisory, and not otherwise. It recommends matters to the Legislature, but they are not binding.

> We need not discuss these, because legislative power is fixed by the Constitution."

While the opinion of the Tax Commission case, supra, does not deal directly with the questions here submitted, yet the statements of the court in that opinion sheds some light on these questions. At l. c. 888, the court in this opinion states:

> "* * * The language of the act itself (save some loosely drawn sections, or parts of sections) indicates no such purpose. * * "

We do not know to what sections the court refers when it speaks of loosely drawn sections, or parts of sections, of this act. Again in the same opinion the court said:

> "* * * The tax commission was formed for a purpose, as indicated by the daw. Its purpose was advisory as to taxation, and as to other things not here necessary to discuss. * * * * "

Again the court, in this opinion, said at l. c. 889:

> "* * The acts of this tax commission in all cases are merely advisory, and not otherwise. * * "

Referring back to said Section 9854 quoted above, it seems that the tax commission is given general supervision over assessing officers of this state and other taxing officials and boards and is authorized to take such measures as will secure the proper enforcement of the revenue laws of the state. In subsection 2 of said Section 9854 it seems that the lawmakers intended that the commission, in the performance of these duties, should call upon the attorney general or circuit or prosecuting attorneys to assist in the enforcement of these laws. It also requires those officials, when called upon, to assist the tax commission in its statu-

tory duties. The latter part of said subsection 2 of subdivision 2 of said Section 9854 requires the prosecuting officials to assist the tax commission in any litigation which it may wish to institute or in which it may become involved in the discharge of its duties.

CONCLUSION.

In answer to your first question, will say from the foregoing it is the opinion of this department that the State Tax Commission, or its chairman, or its members, may institute in the name and on behalf of the State, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the State in matters of taxation and revenue, and enforce any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary, and also, may appear and interplead, answer or defend, in any proceeding or tribunal in matters of taxation and revenue, and in the execution of the foregoing powers shall call upon the attorney general, prosecuting attorneys and/or circuit attorneys of the State to assist the commission in the performance of such duties.

II.

In answer to your second question on the question of whether or not the commission may institute proceedings for the removal of officers for failure to perform their duty, Section 11202, R. S. Missouri 1929, provides as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall know-

> ingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Section 11203, R. S. Missouri 1929, provides as follows:

> "When any person has knowledge that any official mentioned in section 11202 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution

> of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

Section 11205, R. S. Missouri 1929, provides as follows:

> "When an affidavit has been filed with the clerk of the circuit court of any county in this state, as provided in the preceding sections of this article, the governor may, in his discretion, direct the attorney-general to assist in the prosecution against said officer; and in case of the refusal of the prosecuting attorney or special prosecutor, after the filing of the affidavit provided for in sections 11203 and 11204 of this article, to file a complaint, the attorney-general shall have authority to file a complaint against the official complained of."

It seems that the foregoing sections set up a plan for the removal of officers for failure to perform their duties. These require the prosecuting attorneys and/or attorney general to prosecute such cases.

By reading these sections with Section 9854, supra, so far as said Section 9854 applies to the duties of the tax commission in the removal of officers for the failure to perform their official duties, we think that the Tax Commission, or any of its members, when they have the knowledge mentioned in said Section 11203, could make an affidavit to that

effect which would institute a removal proceedings. By reading these two section together it would seem that the answer to your second question would be that the tax commission, or its chairman, or its members, could institute the action for removal of an officer for nonperformance of duties by filing the complaint mentioned in said Section 11203.

III.

In answer to your third question, andbasing the answer upon the foregoing sections, will say that it is the opinion of this department that the tax commission, or its chairman, or its members, may file writs of certiorari in causes in which it is not a party, or in ex parte proceedings, in order that the interests of the State in which tax matters are involved may be properly represented.

In connection with this, we are further of the opinion that such pleadings and actions should be filed and taken by the attorney general or prosecuting attorney or circuit attorney whose duty it is to assist the tax commission in such matters.

IV.

In answer to your fourth question and following the ruling announced above, will say that this department is not in a position to say just what a trial court would do as to permit the tax commission to be heard or file briefs as amicus curiae on taxation matters public in their character, but it appears from the language of said Section 9854 that it was the intention of the lawmakers that the commission, or its chairman, or any of its members, might be authorized to so act in matters in which the revenue laws of the State were involved.

V.

In answer to your fifth question, will say that it is the opinion of this department that the powers of the attorney general and the other prosecuting officers of the State and the State Tax Commission, in

the enforcement of the taxation and revenue laws of this State, are concurrent and co-extensive.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

FRANCHISE TAX: (1) Right of domestic corporation to allocate portion of capital outstate depends upon facts. (2) Goods sold on consignment are not employed in business in foreign state so that capital so tied up can be allocated.

March 22, 1940

3.25

FILED
27

Hon. Clarence Evans, Chairman,
State Tax Commission,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of March 2, 1940, which is as follows:

"Will you kindly furnish the State Tax Commission an opinion concerning the following matter?

Is a Missouri corporation, whose only place of business is in the State of Missouri having tangible property located without the State of Missouri, entitled to allocate such property outstate in making a return for corporation franchise tax due the State of Missouri?

Is merchandise shipped by such corporation on consignment to other states where they have no branch office exempt from the corporation franchise tax?"

Section 4641 R. S. Mo. 1929 provides for the payment of a franchise tax by a domestic corporation based upon its outstanding capital stock and surplus. The statutes then provides:

"If such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed

> to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

In order for a domestic corporation to compute its franchise tax upon the basis provided for in the above quoted portion of Section 4641 it must "employ a part of its capital stock in business in another state or country". Thus, the answer to the first question turns on whether the ownership of property without the state by a domestic corporation is employing a part of its capital in business outside the state.

The tax imposed is not levied upon the property, "but upon the right of the corporation to transact business in this state". State v. State Tax Commission, 221 S. W. l. c. 722 (Mo. Sup.). Or, as stated at l. c. 726 of that case, "a franchise tax is not one levied upon property, but one placed on the right to do business".

In State v. Freehold Investment Co.,264 S. W. l. c. 705 (Mo. Sup.) franchise tax is classed as, "a tax imposed on corporations for the privilege of doing business in this state".

In Kaiser Land and Fruit Co. v. Curry, 103 Pac. l. c. 344 (Cal.) it is made clear that as respects a domestic corporation the tax is upon the <u>right</u> to do business as a corporation and not upon the doing of business, as is the tax on a foreign corporation. The act under consideration there was similar to Section 4641 R. S. Mo. 1929 and we think said section is susceptible to the same construction and has been so construed by the courts in the cases heretofore cited.

Further, in State v. Freehold Investment Co., supra, l. c. 705, it is pointed out that "the tax is not upon the capital stock and surplus, but is merely measured thereby".

In Home Ins. Co. of N. Y. v. New York, 134 U. S. 594, 33 L. Ed. 1025, 1030, the point for determination was whether United States bonds should be excluded in computing the franchise tax due from a corporation, it having a part

of its capital invested in said bonds. The court ruled said bonds were to be included, saying:

> "This doctrine of the taxability of the franchise of a corporation without reference to the character of the property in which its capital or its deposits are invested is sustained by the judgments in Society for Savings v. Coite and Provident Institution v. Massachusetts, which were before this court at the December Term 1867. 73 U. S. 6 Wall. 594, 611."

Thus it appears that the franchise tax in Missouri on a domestic corporation is one on the naked right of the corporation to do business as such in this state, and it not being a tax upon the property of the corporation it is of no concern to the state in what manner the capital of the corporation is invested. As pointed out, the capital is not taxed but is only used to determine the value of the right to do business as a corporation in this state.

The question of whether or not certain investments in property outside the state of Missouri causes the capital so invested to be employed in business in another state is one depending upon the facts in each instance. Your opinion request presents no particular case for decision and we cannot attempt to formulate any rule that could be invoked in making this determination. However, it does appear that the nature of the outstate investment should be measured by the charter of the domestic corporation to determine if the investment is incident to the ordinary and usual business the corporation was organized to engage in and is engaged in. This was the test applied in State v. Hogan, 103 S. W. (2d) 495 (Mo. App.) to determine if a corporation was engaged in business in this state.

Your second question involves whether or not merchandise sold on consignment and shipped out of the state is capital employed by the selling corporation in business in another state so as to entitle said corporation to compute its franchise tax under the above quoted portion of Section 4641.

The exact status of a sale of goods on consignment depends on the terms of the contract of sale, but as a general rule, " 'A consignment of personal property for sale by the consignee as agent for the consignor does not change the title to the property' ". Globe Securities Co. v. Gardner Motor Co., 85 S. W. (2d) 566 (Mo. Sup.). Under this rule the title to the merchandise sold on consignment outstate by a domestic corporation is still in the consignor and is personal property owned in this state.

Republic Steel Corp. v. Atlas Housewrecking & Lbr. Corp., 113 S. W. (2d) 155 (Mo. App.) was a suit on an account, plaintiff being a foreign corporation. The defense interposed was that plaintiff, having engaged in business in this state without obtaining a license to do so, could not maintain the suit. The proof showed that plaintiff had sold defendant, a domestic corporation, some merchandise on consignment and it was this, as defendant contended, that caused plaintiff to be engaged in business in this state. The court, in ruling the point, said l. c. 158:

> "In the case at bar the pipe was shipped to the defendant upon consignment, title remaining in plaintiff and, under the contract, plaintiff had considerable control over the method of the sale of the goods. However, they were sold to defendant's customers, exclusively, plaintiff not attempting to interfere with the matter as to whom the pipe should be sold. Defendant was to be responsible for the payment of the goods sold to its customers and also for the preservation of the pipe, itself, that was shipped to it direct. Under the contract between the parties the relationship between them was that of principal and factor and such relationship without more does not make the factor such an agent of the principal that it can be said that he is conducting the business of the principal in the state where the sales take place."

Thus it appears that merely because a foreign corporation sells goods on consignment to a Missouri corporation does not cause the foreign corporation to be engaged in

business in this state. We think the converse of this is also true so that when a domestic corporation sells goods on consignment to a concern in a foreign state it is not engaged in business in such state. Not being engaged in business in such state it could not then have any of its capital employed there and consequently would not be entitled to compute its franchise tax under the above quoted portion of Section 4641.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General.

LLB:CP

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General.

TAXATION:

SITUS OF TRUST PROPERTY FOR TAXATION:

Trust property held by two trustees living in different counties shall be assessed in the county in which the trust funds are located and one of the trustees resides.

August 28, 1940



Hon. Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question of where certain trust funds shall be assessed for taxes.

It appears from the petition which has been submitted by the trustees that a trust estate was created by a will in the County of St. Louis. By this will two trustees were appointed. The beneficiaries under the will reside in different parts of the United States. The trustees who are now acting by virtue of the provisions of the will reside in the State of Missouri, one residing in the City of St. Louis and the other in the County of St. Louis, where the estate was administered. The trust funds are kept in the City of St. Louis and the business of the estate is conducted from an office in the City of St. Louis. From the memoranda which have been submitted by the counselors for the City and County it appears that the County of St. Louis, as of June 1st, 1939, assessed the entire corpus of this trust estate in the County. The City of St. Louis has, apparently, done the same thing.

The counselor of the County of St. Louis advised the taxing authorities of the County that, while the question has not been settled in this State as to where this property should be assessed, yet he was inclined to believe that the courts would hold that since one trustee lived in the County and one lived in the City, that the property should be apportioned for taxing purposes, and, therefore, the County would tax one-half of the corpus of the estate and the City the other half. The trustees

have taken the position that the entire corpus of the estate should be assessed and taxed in the City of St. Louis. Each party in this case have submitted ample authority to support their contention.

In our research on this question we find that the courts of the various states have taken different views on this question.

In Vol. 67 A.L.R., under the annotations at page 400, we find that the text writer, in regard to this question, stated as follows:

> "Generally, it would seem that the location of the trust property, when in the hands of one or more of several trustees, is the factor determining the situs for taxation of such property. But, in the cases in which the trustee is taxed for property located in another state, in the possession of a co-trustee there, it seems that he can be taxed for his aliquot part of the trust estate only."

Section 9745, R. S. Mo. 1929, which pertains to the assessment of personal taxes, provides as follows:

> "All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held."

Where several trustees are residents in different districts, the rule as to the assessment of the trust property is stated in Vol. 61 C. J., Para. 644, page 531, as follows:

> "If there are several trustees residing in different taxing districts, and the residence or domicile of the trustee fixes the place of taxation, the assessment of the property should be apportioned among them according to their pro rata shares, and this rule has in substance been embodied in statutes in some jurisdictions."

And, in Cooley on Taxation, Vol. 2, 4th Ed., Section 470, at page 1052, the rule is announced as follows:

> "If there are two or more trustees, and part of them reside in one state and part in another state, the general rule is that the assessment of the property should be apportioned among them according to the relative number in the taxing state, in the absence of any statute to the contrary. But when there are several trustees, one of whom is domiciled in the state of origin of the trust, and the corporeal custody of the securities of the trust is with that trustee at his domicile, and the title of the trustees is joint and their powers must be exercised as a unit, there is no such severable ownership in one trustee resident outside the state where the trust was created, as makes him subject to taxation, unless so provided by statute."

The last paragraph of the foregoing rule would seem to support the view taken by the City. In other words, the corpus of the trust estate being at the domicile of the trustee in the City of St. Louis, then the property would be taxed in the City. The properties in this estate are intang-

ibles.

In Bogert's on Trusts and Trustees, Vol. 2, at page 841, he states the case law on the question of the trustee being the owner of trust property as follows:

> "In the absence of contrary statute, the weight of the case authority supports the principle that the executor, administrator, or trustee is to be regarded for the purposes of property taxation as the owner of the trust property. Hence such property may and ordinarily will be assessed for taxation in the state in which the trustee is domiciled, even though the beneficiaries of the trust reside in some other state. The fact that the trustee derives his appointment from a court in another state is immaterial, at least where the property is actually in the possession or control of the trustee at his domicile. * * *"

The case of Pennsylvania In Re Griscom's Will, 3 Atl. (2d) 693, was a case in which there were three trustees. One lived in Florida and two in Pennsylvania. In this case the court held that since the statute made no provision for a division of the properties for taxing purposes that the estate should be taxed in the county of the trustee in which the corpus of the estate was maintained.

As stated at the beginning of this opinion, the courts of our State have not had this question directly before them, but I think that the reasoning used by the court in the case of State ex rel. School District of Plattsburg v. Bowman, 178 Mo. 654, might be applied in this question. In that case, the taxation of a partnership was before the court and the partners who composed this partnership lived in different school districts. It was contended in that case that under Section 9121, R. S. Mo. 1899 (which is the same as Section 9745, R. S. Mo. 1929), that the partnership property should be assessed

against the members in proportion to their interest in the firm and in the county or counties in which such members reside. The court, in that case, in speaking of Section 9121 R. S. Mo. 1899, l. c. 660, said:

> "This section undoubtedly changes the general and original rule, above pointed out, that tangible personal property is assessable and taxable where it is actually located, and makes it assessable where the owner resides. * * *"

Again, in the same case, at l. c. 658, the court announced the general rule on the taxation of property, and that is:

> "* * * Therefore, where the property is actually located is the place where the assessment is made and the tax collected. * * *"

Again, at l. c. 660, the court, in speaking of the rules of law which were applicable where the Legislature had not enacted, in speaking of partnership property, said:

> "It seems reasonably clear, however, that the Legislature did not have in mind partnership property when it enacted section 9121, and that that section is properly referable only to property owned by an individual. And this being true, the statute must be deemed to be silent as to the assessment and taxation of partnership property; and, therefore, the general rules of law pointed out must be held to obtain."

Since our lawmakers have failed to make any provision for the taxation of trust property which is held by two

trustees living in different districts, or counties, then we think the rule announced in the Bowman case, supra, that is, "where the property is actually located is where the assessment should be made and a tax collected," should be applied in a case like the one here in question. The trustees in this estate act jointly and they administer this estate in the City of St. Louis. The corpus of the estate receives the benefits of the governmental protection of the City of St. Louis, and that, together with the fact that one of the trustees lives in the City of St. Louis, leads us to the conclusion that, since there is no statutory authority to split up this estate and apportion it to different taxing districts, that the entire estate should be assessed and taxed in the City of St. Louis.

CONCLUSION.

From the foregoing it is the opinion of this department that a trust estate which is administered by two trustees, one living in one county and one in another, in the State of Missouri, should be assessed and taxed in the county in which the corpus of the trust estate is kept and in which one of the trustees resides.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

TAXATION:
ASSESSMENT:
INTERSTATE BUS AND TRUCK: The State Tax Commission has power to assess property of common carrier interstate bus and truck lines because they are public utilities, but does not have power to assess property of contract hauler interstate bus and truck lines because they are not public utilities.

September 9, 1940

1-16

FILED
27

Mr. Clarence Evans
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated May 22, 1940, in which, in the following terms you request our opinion:

> "By the provisions of Section 10,066, Laws of Mo. 1939, page 872, it is the duty of the State Tax Commission to assess interstate bus and truck lines.
>
> "The State Tax Commission interprets this section as vesting power in it to assess bus and truck lines doing business as common carriers, but is uncertain whether or not it has power to assess truck lines classified by the Public Service Commission as contract haulers - regular or irregular.
>
> "Will you kindly advise us as to our powers and duties in assessing interstate bus and truck lines under this section?"

Section 10000 R. S. Missouri, 1929, as amended Laws 1939, page 872, sec. 1, Mo. Stat. Ann. 8057, provides:

"All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines,

> interstate bus and truck lines, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, or express companies in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

It is especially noted that said Section 10066 provides that taxes shall be levied and collected on the property of interstate bus and truck lines, and on the property of electric transmission lines, in the same manner as for railroads.

Provision is made for assessment of railroad property by the State Tax Commission in Section 9854 (6) R. S. 1929, Mo. St. Ann. page 7931, which is as follows:

> "The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms now possessed and exercised by the state board of equalization. Said commission shall also have all powers of original assessment of real and personal property now possessed by any assessing officer, subject only to the rights given by the Constitution to the state board of equalization."

From the foregoing, it is clear that with reference to assessment of property, interstate bus and truck lines, and electric transmission lines are placed in the same legal situation. The principles which apply to electric transmission lines will likewise apply to interstate bus and truck lines. The principle is established that not all electric transmission lines are subject to assessment by the State Tax Commission; that only such lines which are public utilities are subject to assessment by said Commission. It was so ruled in State ex rel Buchanan County Power Transmission Company vs. Baker 9 S. W. (2nd) 589, l.c. 591, 320 Mo. 1146 where the Supreme Court of Missouri said:

> "Relator's electric transmission line is subject to taxation. The question for solution is the location of the authority to assess said property. Respondents contend it is lodged with the tax commission, and relator contends it is lodged with the county assessor. If it is a public utility, the tax commission has authority to assess it. If it is not a public utility, we are to determine with whom the authority is lodged."

In that case, after quoting section 12847 and section 15056, R. S. Mo. 1919, (now sections 9854 and 10066 R. S. Mo., 1929, respectively) the court further ruled at l.c. 592-593 of the same volume:

> "We think the word 'manner', as used in said section, covers not only the method of assessment of electric transmission lines, but also locates the authority to make the assessment with the tax commission. State ex rel. Union Electric Light & Power Co. et al. v. Gehner et al., 315 Mo. 666, 286 S. W. loc. cit. 119; State ex rel Union Electric Light & Power Co. v.

Baker et al., 316 Mo. 853, 293 S. W. loc. cit. 402. The power of original assessment over purely local property is fixed by section 10, article 10, of the Constitution, in the following words:

'The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.'

Thus it appears that local property must be assessed by local authorities. If, therefore, the Legislature intended by the amendment of 1923 to section 13056 to confer upon the tax commission the power of original assessment over local property devoted to private use, then said amendment is violative of this section of the Constitution. Laclede Land & Improvement Co. v. State Tax Commission, 295 Mo. 298, loc. cit. 305, 243 S. W. 887. However, if the Legislature only intended to confer on the tax commission the power of original assessment over public utility electric transmission lines, then said amendment is a valid law. We will not assume that the Legislature undertook the enactment of an unconstitutional law. Rather, we hold that by the amendment the Legislature intended to confer upon the tax commission the power of original assessment over only public utilities."

Under those principles an interstate bus and truck line

which is a public utility is subject to assessment by the State Tax Commission; such a line which is not a public utility is not subject to assessment by said Commission.

In Section 5122 (9) R. S. 1929, Mo. St. Ann. page 6533, the term "common carrier" is defined as "railroad corporations . . . and every corporation . . . or . . . person . . . operating . . . any such agency for public use in the conveyance of persons or property * * *." (Underlining ours) And, subdivision 25 of the same section (Mo. Stat. Ann. page 6536) provides in part that, "The term 'public utility' . . . includes every common carrier * * ." In State ex rel Anderson v. Witthaus 102 S. W. (2nd) 99, l.c. 101, 102, 340 Mo. 1004, the Supreme Court of Missouri quoted with approval the following definitions of a common carrier:

> "If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract.' * * * * * * * * We express a doctrine universally sanctioned when we say that anyone who holds himself out to the public as ready to undertake for hire or reward the transportation of goods from place to place, and so invites custom of the public, is in the estimation of the law a common carrier. * * * * * * * The test is whether he has invited the trade of the public."

In the definition of a public utility found in 4 Words & Phrases (3rd Series) 425, it is said that, "common carrier railroads are 'public utilities'". It necessarily follows that a common carrier interstate bus and truck line is a public utility, and therefore is subject to assessment by the State Tax Commission.

For the purposes of this opinion, in determining

whether either a common carrier or a contract hauler interstate bus and truck line is a public utility, we are guided by the test stated in the following terms in 4 Words & Phrases (5th Series) 1137:

> "Test for determining whether corporation is assessable as 'public utility' is whether plant, equipment, or portion thereof is used to furnish heat, light, or power to public. St. 1931, Section 76.02(8). Union Falls Power Co. v. City of Oconto Falls, 265 N. W. 722, 221 Wis. 457.
>
> The term 'public utility' implies a public use * * * "

And, a leading authority is summarized in these words in 6 Words & Phrases (3rd Series) 424:

> "A taxicab company is a common carrier within the meaning of the act of March 4, 1913 (37 Stat. at L. 938, chap. 150), Section 8, and hence subject to the jurisdiction of the Public Utilities Commission of the District of Columbia as a 'public utility' in respect of its exercise of its exclusive right.
>
> * * * to solicit livery and taxicab business from persons passing to or from trains, and of its exclusive right under contracts with certain Washington hotels to solicit taxicab business from guests, but that part of its business which consists in furnishing automobiles from its central garage on individual orders, generally by telephone, cannot be regarded as a public utility, and the rates charged for such service are therefore not open to inquiry by the Commission. Terminal Taxicab Co. v. Kutz, 36 S. Ct. 583, 584, 241 U. S. 252, 60 L. Ed. 984."

It appears that the test whether a thing is a common carrier and whether it is a public utility is the same - devotion of property to a public use. It is found in both. In State ex rel Anderson v. Witthaus, supra, at l.c. 102 of 102 S. W. (2nd) it was further ruled:

> "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. White v. Smith, 189 Pa. 222, 42 A. 125, 43 L.R.A. 498."

The property of a contract hauler is not devoted to a public use. Such hauler is defined as follows in Section 5264(c) Mo. Stat. Ann. page 6679, 6680:

> "(c) The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town, and its suburban territory as herein defined." (Underlining ours)

According to that definition, such a hauler does not hold himself out to do it for everyone who asks him; he does not hold himself out to the public or invite its trade.

Certainly he does not furnish service to the public at large. The essential feature of the use of his property is that it is confined to individuals so privileged by contract and by special agreements; he does not operate as a common carrier. His property is not devoted to a public use. In 3 Words & Phrases (4th Series) 276, it is said:

> "Individual or corporation does not become 'public utility,' unless owning, operating, managing, or controlling plant or system for public use * * ."

Also, in 6 Words & Phrases (3rd Series) 421, the rule is stated:

> "A corporation becomes a public service corporation, and therefore subject to regulation as a public utility, only when and to the extent that the business of such corporation becomes devoted to a public use."

In the light of these principles, a contract hauler interstate bus and truck line is not subject to assessment by the State Tax Commission because it is not a public utility.

The Public Service Commission does regulate contract haulers by authority delegated by the legislature (e. g. Section 5270 et seq R. S. 1929, Mo. Stat. Ann. page 6687 et seq, as amended Laws 1937, page 436, Section 1). The authority for the exercise of such control and regulation is not that contract haulers are public utilities. It is that the state has the power to regulate the use of its public highways by anyone. In State v. Dixon 73 S. W. (2nd) 385, l.c. 387, 335 Mo. 478, the Supreme Court of Missouri said:

> "Without a discussion of the point or citation of authority we may assume and

> begin with the proposition that the Legislature had the power and authority to establish a commission for the purpose of regulating the public utilities of the state, and also for the purpose of regulating the transportation for hire by bus and trucks of passengers and freight. * * * * * * * * * * * * It is settled law that the highways are built primarily for the convenience of the citizens of the state. The transportation for hire of passengers and freight may be prohibited entirely, or the right may be granted with such restrictions as the state may deem necessary to impose."

CONCLUSION

The State Tax Commission has power to assess property of common carrier interstate bus and truck lines because they are public utilities, but does not have power to assess property of contract hauler interstate bus and truck lines because they are not public utilities.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL F. HEWITT
(Acting) Attorney General

EH:RT

RECORDER OF DEEDS:
DEEDS OF TRUST :

In the event foreclosure proceedings are instituted by one or more bondholders, when the bonds are secured by a deed of trust, only those bonds need be produced to recorder of deeds under the statute.

October 7, 1940

FILED
27

Mr. John P. English
Recorder of Deeds
St. Louis City, Missouri

Dear Sir:

This is to acknowledge your letter of recent date, requesting an opinion from this department, respecting the foreclosure of a deed of trust under the provisions of Laws of Mo. 1933, pages 192 and 193.

We deduce from your request for an opinion, which is quite lengthy and unnecessary to set out, that the question for determination is whether or not under the provisions of the statute hereinafter noticed, the recorder of deeds may compel the production of one hundred and sixty bonds which were secured by a deed of trust containing a power of sale, when the power of sale is exercised and a new trustee's deed is to be presented to the recorder for recordation.

Attention is directed to Laws of Mo. 1933, supra, which reads in part as follows:

> "In all cities in this State which now have or which may hereafter have 600,000 inhabitants or more and in all counties of this State which now have or may hereafter have 200,000 inhabitants and less than 400,000 inhabitants, no trustee's deed or mortgagee's deed under power of sale in foreclosure of any deed of trust or mortgage shall be accepted by the recorder of deeds for record unless the principal note or notes or other principal obligations which were unpaid when the foreclosure sale commenced and for the default in payment of which foreclosure is had, are produced to the recorder, or if said notes are lost then the affidavit of the owner of the principal notes or obligations that they are lost. Upon such trustee's or mortgagee's deed

> being filed for the record, the recorder shall make a notation on the margin of the record of the deed of trust or mortgage, and on the said principal note or notes or other principal obligations showing that such deed in foreclosure has been filed of record, in substantially the following form: 'Deed under foreclosure filed . . . . . 19 . . . . . Recorder.'" (Under-scoring ours.)

It is to be noted from your request for an opinion, that the attorneys for the holder of 50% of the bonds and coupons outstanding take the position that, after the foreclosure proceedings are instituted and a new trustee's deed is presented to the recorder only 50% of the bonds and coupons need be produced. It is to be further noticed, that this position of the attorneys is predicated upon the theory that the percentage of bonds and coupons held by their client are the principal notes which were unpaid and for the default in payment of which the foreclosure is had. Therefore, to satisfy the terms of the statute this percentage of bonds is all that is necessary to be presented to the recorder.

Apparently, this view is supported by the statute. We say apparently, because the statute is not entirely free from ambiguity. Consequently, in arriving at what we believe to be the intention of the legislature, we must be governed by fundamental rules of statutory construction. In this respect, attention is directed to the case of Bowers v. Missouri Mut. Ass'n, 62 S. W. (2d), 1058, in which case the court in speaking of the construction of statutes at page 1063 said:

> "* * * In arriving at the legislative intent, doubtful words of a statute may be enlarged or restricted in their meaning to conform to the intent of the lawmakers, when manifested by the aid of sound principles of interpretation. * * * * Laws are passed in a spirit of justice and for the public welfare and should be so interpreted if possible as to further those ends and avoid giving them an unreasonable effect. * * * * "

Attention is also directed to the case of State ex rel. Lentine v. State Board of Health, 65 S. W. (2d) 943. In that case the court in speaking of rules of statutory construction at page 950 said:

> " * * * such rules should not be so applied as to restrict or confine the operation of a statute within narrower limits or bounds than manifestly intended by the Legislature and whether the proper construction of a statute should be strict or liberal it certainly should be such as to effectuate the obvious purpose of its enactment and the evident legislative intent. * * * "

Attention is also directed to the case of State v. Irvine, 72 S. W. (2d), 96. In that case at page 100, the court said:

> "* * * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation. * * * "

Attention is directed to the case of Artophone Corporation v. Coale, 133 S.W. (2d) 343, in which case the court, at page 347 said:

> " * * * * 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' * * * "

Tersely stated, it is to be deduced from these considerations, that a statute should receive a reasonable construction so as not to produce unreasonable consequences or absurd results.

Hence, in ascertaining the legislative intention, words used in a statute should be construed honestly and faithfully so as to promote its object. These observations lead us to a consideration of the statute before us.

In substance and effect, the statute provides that "* * * * no trustee's deed * * * under power of sale in foreclosure of any deed of trust * * * shall be accepted by the recorder of deeds for record unless the principal * * * notes * * * which were unpaid when the foreclosure sale commenced and for the default in payment of which foreclosure is had are produced to the recorder * * *".

From the language noticed in the statute, a colorable basis is afforded to you as recorder of deeds to refuse to file a trustee's deed in the event all of the principal notes which were secured by a deed of trust are not produced. On the other hand, it is to be observed, what caused the foreclosure? A solution to this question must necessarily be found in the terms of the deed of trust. In this respect, the deed of trust in part provides:

> " * * * WHEREAS, for the further securing the payment of the said Bonds and the interest thereon, the said St. Louis Gymnastic Society has agreed and does by these presents for its successors and assigns, convenant and agree to and with the said parties of the second part as Trustees and for the benefit of the said parties of the third part and their assigns, holder or holders of the said bonds above described * * * * "

It is further provided in part, that:

> "* * * If the said party of the first part or any one for it or its representatives or assigns shall well and truly pay off and discharge such debt and interest expressed in the said bonds and every part thereof, when the same shall become due and payable according to the true tenor date and effect of said bonds and shall well and truly keep and perform all and singular and several covenants and agreements hereinbefore set forth, then this trust and the lease hereinafter set forth, shall cease and be void and the property hereinbefore conveyed shall be released at the cost of the said party of the first part

> but if said debt on the said interest or any part thereof be not so paid when the same or any part thereof shall become due and payable according to the true tenor date and effect of said bonds or if default be made in due fulfillment of said covenants and agreement or any one of them, then this conveyance shall remain in full force, and the said parties of the second part (whether acting in personal or by attorney in fact thereinto authorized under seal) or in case of their death refusal to act, or other legal in capacity, the then acting sheriff of the City of St. Louis, in the State of Missouri, in this trust, may proceed to sell the property hereinbefore conveyed or any part thereof of public vendue or outcry on the eastern front door of the Court House in the City of St. Louis and State of Missouri, to the highest bidder for cash, * * * "

An examination of the portions of the deed of trust set forth discloses that it not only secured the principal, but secured the payment of the interest, and in the event a default of interest or any part thereof occurred, then the power of sale may be exercised for the benefit of all the bondholders and any proceeds remaining should be applied to the payment of said debt or interest. It is thus to be seen, that if the interest remains unpaid and due on any one of the bonds it would be entirely possible for any holder of a bond secured by the deed of trust to institute proceedings for foreclosure. This is not entirely amiss with the general proposition of law, that any one bondholder may enforce foreclosure proceedings. In this respect, attention is directed to the case of Graves v. Davidson 68 S.W. (2d) 711. In that case, the question before the court for solution, was whether or not a foreclosure sale was premature because the note secured by the deed of trust was not due and payable until March 1, 1930, and that on its face it did not provide for acceleration of the due date because of non-payment of interest annually or at stated times. Therefore, the deed of trust could not be foreclosed until after maturity of the note. In resolving the question, the court said at page 715:

> "* * * * By express terms of the note the parties made the interest payable semiannually.

> By the deed of trust they provided for foreclosure if the grantors failed to pay the interest when same or any part thereof became due and payable 'according to the true tenor, date and effect of said note.' That clause of the deed of trust was clearly meant to authorize foreclosure for nonpayment of the interest installments as they became due and payable semiannually by the terms of the note without waiting until the principal debt became due. We see no reason why the parties might not competently so contract or why such provisions in the deed of trust should not be held valid. * * * * "

In the above case, as here, the deed of trust as above set out provides, if the interest or any part thereof be not paid according to the true date and effect of the bonds secured, the holder or holders thereof may enforce foreclosure proceedings. Hence, it follows upon principle, under the terms of the deed of trust, if any part of the interest be not paid when due on any bond, such bondholder may enforce foreclosure proceedings. If then, foreclosure proceedings are instituted, and the property conveyed by the deed of trust is sold under the acceleration clause, such as we believe is presented by the deed of trust here involved, then it must be because of the failure to pay the interest on said principal note that caused the foreclosure sale and the default in payment of interest thereon, for which the foreclosure is had. Hence, when the trustee's deed under power of sale and foreclosure of the present deed of trust is presented to the recorder, it would only be necessary to produce to the recorder, bonds which were unpaid and for the default in payment of which the foreclosure proceedings were instituted.

This conclusion is in accord with provisions of the deed of trust before noticed. It is not believed that the parties to the deed of trust intended to require all the holders of bonds to agree to elect to accelerate the maturity of the entire issue after default. Any other interpretation of the deed of trust would present insurmountable difficulties in the sale of the bonds secured thereby, and prevent the accelerating of the maturity of the obligation in the event of default.

This interpretation of the deed of trust definitely supports our construction of the statute. If the statute under consideration

were construed in the present instance to mean that all of the one hundred and sixty bonds secured by the deed of trust after foreclosure sale would have to be produced to the recorder, then the statute presents an absurd situation whereby its terms could never be followed. Such we believe was never intended by the legislature.

You will appreciate that this opinion is predicated upon the terms of the deed of trust.

CONCLUSION

It is the opinion of this department that, only 50% of the bonds secured by a deed of trust, here under consideration, need be produced to the recorder of deeds in the event the foreclosure sale is to be instituted in order to comply with the terms of the statute.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RCS:ww

JUSTICES OF THE PEACE: Trials in justice courts for misdemeanors must be held in the township in which offense was committed. Justice of the peace is not authorized to send the case to another township and if it is done the justice of the latter township has no jurisdiction to try the case and if it is tried and appealed to the circuit court, the circuit court has no jurisdiction of the case.

CRIMINAL PROCEDURE:

CHANGE OF VENUE:

October 10, 1940

10-11

FILED
27

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you submit the following statement and question:

"In July, 1939 I filed an information charging one Gibbs with a misdemeanor in Castor Township of this county. After the information was filed and the witnesses subpoenaed, the Justice of Peace informed the state and the Defendant that he could not render a fair and impartial decision in said cause because of his bias and prejudice in the matter, whereupon he transcripted all of the pleadings in the case and transferred the cause to one of the Justices of St. Michael Township of the same county.

"The case was set for trial before the Justice of St. Michael Township, Madison County, Missouri and the de-

fendant filed a motion to quash the information on the ground that the Justice in St. Michael Township did not have jurisdiction because the Justice of Castor Township had no authority to transfer the cause to St. Michael Township. The motion to quash was overruled and the Defendant was placed on trial and convicted. He appealed to the Circuit Court of Madison County and in the September term, 1939, of said county, defendant filed a motion to quash the information on the ground that the justice court of St. Michael Township had no jurisdiction and based his motion upon that part of the above described sects, which reads as follows:

"'Provided, that all prosecutions before Justice of Peace for misdemeanor shall be commenced and prosecuted in the Township wherein the offense is alleged to be committed.'

"The motion was taken under advisement by the court and at the September term, 1940 was sustained. * * * * *

"I would like to secure your opinion on this subject. I have never been able to find a case decided by the courts of our State on this subject directly. * * * *"

Section 37 of Article VI of the Constitution of Missouri, provides as follows:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may

> require, whose powers, duties and duration in office shall be regulated by law."

From this section it will be seen that the powers and duties of the justice of the peace are regulated by statute. In our research of the statutes we fail to find where a justice of the peace is authorized on his own motion to disqualify and send a criminal case to another township. Section 3414 R. S. Mo. 1929 clearly shows that such prosecutions shall be commenced and prosecuted in the township wherein the offense is committed. That part of this section applicable to this question is as follows:

> "Provided, that all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed: Provided further, that nothing herein contained shall prevent the defendant from taking a change of venue, as provided for in this article."

It will be noted that the last sentence of this paragraph permits the defendant to take a change of venue from the township if he so desires.

Section 3429 R. S. Mo. 1929, which deals with the question of change of venue of misdemeanors in justice courts, provides as follows:

> "The defendant shall be entitled to a change of venue if he shall, before the trial of the case is commenced before the justice, or before the jury is sworn, file an affidavit, stating that the justice is prejudiced against him, or is a near relation to the injured party or prosecuting witness, stating in

> what degree, or interested in the subject of the offense, or is a material witness in the case, or that the defendant cannot have a fair trial in the township, on account of the bias or prejudice of the inhabitants thereof, as the defendant verily believes."

We have made some research on this question and we find the case of State v. Sexton, 141 Mo. App. 694, is applicable and pertinent to your question. This case has been followed on a number of occasions and cited as recently as 220 Mo. App. 411. In the Sexton case the information was filed before a justice of the peace in a township in the county charging the defendant with a misdemeanor. A change of venue was taken to another justice of the peace before whom the defendant was tried and convicted and he appealed to the circuit court. In connection with this point the court in this case said, l. c. 698:

> "* * * It is a general rule, that inasmuch as the justice of the peace has only such jurisdiction as the statute confers upon him, the facts giving such jurisdiction must affirmatively appear on the face of the proceedings. * * * *"

And, at l. c. 699 the court again said:

> "It must also be conceded by this court, that the Legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others. * * *"

At l. c. 700 the court again said:

> "We believe it was the intention of the Legislature that the prosecution should be commenced in the township in which the alleged offense was committed. * * * *"

At l. c. 701 the court said:

> "The jurisdiction of the justice before whom this information was filed, depended upon the question as to whether the alleged offense was committed in his township. As the evidence does not disclose, we cannot say that the justice had jurisdiction to try the defendant, and if no jurisdiction was in the justice court, none was acquired by the circuit court on appeal."

So, if the justice of the peace in your case, had no jurisdiction to try the case and if it was tried and appealed to the circuit court, then, under the ruling announced first above in the Sexton case, the circuit court had no jurisdiction. Since the justice of the peace acts by virtue of the statute and without such authority his acts are void, then, since the justice of the peace of Castor Township had no authority to transfer the case to St. Michael Township, then even if the case were before the justice in St. Michael Township, he had no jurisdiction and any proceeding in the latter township pertaining to this prosecution was null and void.

CONCLUSION.

From the foregoing it is the opinion of this department that a justice of the peace before whom a misdemeanor is filed is not authorized of his own motion to transfer such criminal case to another township and if he does do so the justice in the township to which such cause is

transferred does not have jurisdiction to try the case and if he does hear and try the case and it is appealed to the circuit court, the circuit court has no jurisdiction to try this case.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

PROSECUTING ATTORNEY: Prosecuting attorney-elect cannot assume office prior to January 1 if he is leaving December 15th, nor can he appoint a deputy under such circumstances. The present prosecuting attorney can continue to hold office until his successor qualifies and assumes office.

December 13, 1940

12-14

FILED 27

Honorable John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

You submit to this department for an official opinion questions based on the following facts:

You are now the Prosecuting Attorney of Washington County. You were not a candidate to succeed yourself and the lawyer who was elected at the November election has been called into the Naval Reserve Officers of the United States Government and will report for active duty the middle of December. The questions to be answered are: Can your successor now qualify before leaving; if so, can he appoint an assistant to take active charge of the office in his absence? If he cannot qualify at the present time, do you hold over or does a vacancy exist?

The election of a prosecuting attorney and his qualifications in counties such as Washington are prescribed by Section 11309, R. S. Missouri 1929, which is as follows:

> "At the general election to be held in this state in the year A. D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks elec-

> tion for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

Of course, the above section governs the election of your successor-elect. The term of your office, and likewise for the successor-elect, is governed by Section 11310, R. S. Missouri 1929, which is as follows:

> "Prosecuting attorneys elected under the provisions of this chapter shall enter upon the discharge of their duties on the first day of January next after they shall have been elected."

The decision of State ex inf. Barrett, Attorney General, ex rel. Oakley v. Schweitzer, 258 S. W. 435, involved the question of long and short term and the question of a vacancy in the office of the prosecuting attorney of the City of St. Louis, but we think it is clearly an authority to the effect that you hold your present tenure of office until midnight of December 31, 1940, and that your successor, provided he should succeed you, would then be entitled to assume office on the first day of January, 1941. We refer you to a portion of the decision, l. c. 439:

> "The regular electionfor prosecuting attorney was for the four-year term, beginning January 1, 1923. Sections 702, 730, R. S. 1919. The prosecuting attorney elected in 1918 would have been entitled to hold office until midnight December 31, 1922. The person elected for the succeeding regular term would not have been entitled to take office, under ordinary conditions, until January 1, 1923, unless the fact that the appointee to fill the vacancy could only hold until the next regular election to fill such office would

> authorize the person elected for the regular term to take over said office prior to January 1, 1923. * * * * * * "

Irrespective of the decision by the court, we think that Section 11310, supra, is very plain in its terms to the effect that you hold the office until January 1, and that your successor cannot take over the office until that time, for the general rule is stated in 46 Corpus Juris, page 965, to this effect:

> "The term of office begins from the time, if any, fixed by law, not necessarily from the date of appointment or qualification. * * * * * * * "

Even assuming that he has his commission and possesses all the other qualifications, we think that the commission that he may receive at the present time will have no effect or bearing on his status with respect to assuming the duties of the office before leaving the county.

The decision in the State of South Carolina, State v. Billy, 11 S. C. L. 356, is cited for the purpose of showing the present office of a commission and its origin--

> "'Regarding, then, the common law, we easily perceive why a commission may be essential under the English government. There, in a word, it is at once the expression of the royal will, and the partial delegation of his power. There, for the purposes of his office, the officer is the agent of the king, and the commission is his letter of attorney, wherein he finds his power, of what kind, and to what extent. But take away the reasons, and the same consequences do not follow. In this country the officer derives no power from the

> chief magistrate. In this State, indeed, he has not much to spare; and the commission becomes the mere certificate of election, or the formal annunciation of appointment.'"

Section 104, page 966 of Volume 46 Corpus Juris, referring to commissions, is as follows:

> "Since an elective officer has title to his office from the people, not from the executive commission or other formality, his term may begin, notwithstanding his failure to receive a commission."

Hence, we are of the opinion that even though your successor-elect receives his commission at the present time, which appears to be about the only formality other than taking the oath necessary for a prosecuting attorney provided he possesses the statutory qualifications, no bond being required, to assume his office, yet the commission would not entitle him to assume office in the face of the express contrary provisions of the statute being January the first.

When the statute fixes the time when a term shall begin the term cannot begin prior to such time. Brown ex rel. Gray v. Quintilian, 121 Conn. 300.

If he will not be in the county to assume office on January the first, there is no provision or authority whereby he can take over the office by proxy or deputy. Section 11336, R. S. Missouri 1929, entitles every prosecuting attorney in the state to appoint one assistant. Section 11337, R. S. Missouri 1929, expressly gives the authority to the prosecuting attorney, by writing, to make the appointment. Deputies and assistants derive their power from their principal or superior. Since the prosecuting attorney in the instant case must appoint the assistant, it naturally follows that the prosecuting attorney cannot appoint an assistant until

such time as he legally assumes office. In other words, if the prosecuting attorney-elect cannot assume office until January 1, and is leaving the county before that time, he is not legally in office and cannot breathe legal authority into an assistant which he himself does not possess.

There are constitutional provisions which have a bearing on the questions; for instance, Article XIV, Section 4, Constitution of Missouri--

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Another pertinent provision is Section 18 of Article II--

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

We cite the above provisions of the Constitution as prospective barriers which might confront your successor-elect in the event that he would assume office and be absent from the county on military duties.

We next consider the question of your status. The general rule of law supported by unanimous decisions is that an officer holds his office until his successor is elected, commissioned and qualified. Section 11309, R. S. Missouri 1929, contains that provision. It is almost idiomatic that the law abhors vacancies and no vacancy exists as long as any person is in a particular office.

In the decision of State ex inf. Hulen v.

Brown, 274 S. W. 965, and the decision of State ex inf. v. Williams, 222 Mo. 268, the holding is to the effect that an incumbent holds office until the office is filled by someone else who is duly elected and qualified.

Therefore, we are of the opinion that you are entitled to hold the office of prosecuting attorney until your successor qualifies and assumes the office and no vacancy will exist unless you resign or abandon the office.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:DA

TAX AND REVENUE: Lands sold at the third publication in the years of 1937 and 1938 are not affected by Senate Bill 311, Laws of Mo. 1939, with reference to making such sales final. Deeds are to be made under provisions of Sec. 9957, Laws of Mo. 1933.

FILED
2-28

February 16, 1940.

In re: 1939 Laws of Missouri.
Sec. 9953a.

Honorable Harold Fenix,
Collector of Revenue
Jasper County,
Carthage, Missouri.

Dear Mr. Fenix:

We desire to acknowledge receipt of your request for an opinion dated February 14. 1940, which reads as follows:

> "We should greatly appreciate an opinion from you stating whether or not the above section applies to property sold at the third publication in the years 1937 and 1938, or whether the law applies only to such property as will be sold at the third publication since this law was passed.
>
> "We have been confronted with this problem by several purchasers at sales who are the owners of the property, and we should like a definite statement as to whether we shall issue tax deeds to them for property which they purchased in 1937 and prior years."

In an opinion rendered by this department to Mr. R.L. Jones, County Court Clerk of New Madrid County on October 12, 1939, it was held that:

> "Senate Bill No. 311 makes the third sale, and a sale subsequent to the third offering in case sale is not made at the third offering, final by requiring the delivery of a deed by the collector. The bill, therefore, makes such sales final and nullifies the equity of the redemption from the same of all parties interested

> including all junior lienors. There could then be no resale for the deficiency after such third or subsequent final sale under the provisions of Senate Bill No. 311 of the Laws of 1939 because such resale for a deficiency could be executed only after a third sale was had under the 1933 Act and a redemption therefrom, which will be repealed on the effective date of Senate Bill No. 311.
>
> "Redemption is further provided in Section 9956a in the 1933 Act, supra, and, Senate Bill No. 311 repealing the equity of redemption as to the third and subsequent sale, leaves the right of two years redemption, under the provisions of said Section 9956a, available with reference to the first and second offerings or sales. The two years redemption as to such first and second offerings or sales is unaffected by Senate Bill No. 311 except that such redemption is limited in case of a third or subsequent sale thereunder."

In an opinion rendered by this department to Hon. Henry C. M. Lamkin, Prosecuting Attorney of Callaway County, on October 28, 1939, it was held that:

> "It is, therefore, the conclusion of this department that, a certificate-holder at a third sale under the provisions of Senate Bill No. 94, Laws of Missouri 1933, is entitled to a deed and possession after the redemption period unless he fails to pay subsequent taxes and permits the property to be sold under the provisions of Section 9953a, Senate Bill No. 311, Laws of Missouri 1939, at page 851, and in such event he loses all rights obtained under the certificate of purchase."

Section 9957, Laws of Missouri, 1933, at page 438, is in part as follows:

> "If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold.* * *"

The conclusions reached in the above two opinions, that third sales under the provisions of Senate Bill No. 94, Laws of Missouri, 1933, made prior to the effective date of Section 9953a, Senate Bill No. 311, Laws of Missouri, 1939, at page 851, which repealed the third sale provided by Senate Bill 94, were not affected by said Senate Bill 311 with reference to making such sales final, were reached on the basis that, to impose the finality of a third sale provided in said Senate Bill 311 in 1939, upon a third sale made under said Senate Bill 94, passed in 1933, which provided redemption from such third sale, would construe said Senate Bill 311 to be retroactive and, therefore, unconstitutional.

Senate Bill 311, repealing Secs. 9953a and 9953b of Senate Bill 94, Laws of Missouri, 1933, is a procedural law for the collection of delinquent taxes on real estate. Such statute comes under the rule stated by the court in State ex rel. V. Hackman, 272 Mo. 600, 607, which is as follows:

> "As a general rule, a statute expressly repealed is thereby abrogated and all proceedings commenced thereunder which have not been consummated are rendered nugatory unless the repealing act is modified by a saving clause. * * * * * Although there was an express repeal of the former statute the immediate reenactment of same, except as to the changes noted, left, so far as the practical application of the law is concerned, the same power in the county court. Under these conditions, although the latter law does in terms repeal the former, the effect is not to be ascribed to it of annulling all proceedings commenced when the former law was in force. The operative force of both laws being essentially the same, the latter may properly be construed to be a continuance of the former; and, it is only necessary to render the steps taken regular that subsequent proceedings are required to conform to the latter. (State ex rel v. Vernon County, supra.)."

The action for sale of real estate for delinquent taxes provided in said Senate Bill 311 is summary, but follows due process and is equivalent, with reference to conveying rights, to a judgment and sale in a plenary proceeding. Therefore, a sale had under such proceeding would follow the rule, as to procedure, laid down in the case of Mayhew v. Todisman, 151 S.W. 436, 438, which is as follows:

> "(1) This suit is, by the averments of the petition, founded expressly upon the provisions of section 650 of the Revised Statutes of Missouri 1899. The judgment from which the appeal is taken was entered in 1908, and is consequently unaffected by the amendment of 1909.* * *"

CONCLUSION.

Therefore, it is the opinion of this department that lands sold at a general delinquent tax sale on the third publication in the years of 1937 and 1938, were sold under the provisions of Senate Bill 94, Laws of Mo. 1933, and that Senate Bill 311, Laws of Mo. 1939, making the third sale final, does not affect sales so made on the third publication for said years, with reference to making such sales final. It is further our opinion that tax deeds should only issue in such sales under the provisions of Sec. 9957, supra, after the certificateholder has met all other requirements of said Senate Bill 94.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM/LD

LIQUOR:
COUNTIES: A county cannot charge and collect a license fee from distillers whose premises are not located within such county.

March 14, 1940

3-15

FILED
28

Honorable Harold Fenix
Collector of Revenue
Jasper County
Carthage, Missouri

Dear Sir:

We have received your letter of March 7, which reads as follows:

"Below is a copy of a recent court order made by the Honorable County Court of Jasper County, Missouri, as follows, to-wit:

'For the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors of all kinds, to, by or through a duly licensed wholesaler within this State, and this County of Jasper, State of Missouri, any person, partnership, association of persons or corporation, shall first pay into the county treasury the sum of three hundred dollars, ($300.00) per year.'

I have had a number of letters from distilling companies, and their attorneys, protesting that $300.00 is an excessive charge, in view of the fact that the state asks only $250.00 for the same type license.

Please advise me, at your earliest convenience, which amount can lawfully be charged. I am holding several checks in the amount of

$300.00, until I receive your opinion.

Also, please advise me if the above court order should apply to distilling companies which have located their business premises outside the county of Jasper, State of Missouri, and if above order is in accordance with Section 21, Session Acts 1937, page 529, and Section 25, Session Acts 1935, page 276."

One of the questions you have asked is whether or not the order of the county court which you have set out in your letter should apply to companies engaged in distilling intoxicating liquors when the premises of the distillers are located outside of Jasper County, Missouri, and the company has no premises whatsoever located within such county.

It is a well recognized principle of law that when the legislature provides a uniform system for the regulation, control and licensing of the liquor traffic, the only existing rights and powers are those contained in any such uniform legislative system. In other words, the only authority any political subdivision, such as a county or city, might have to regulate and control the sale of intoxicating liquor must be delegated by the Legislature in its uniform system. This rule is thus expressed in 33 C. J. 521, as follows:

"In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been consistently held to have only such powers as are expressly conferred upon them by their charters or by statute, or such as are necessarily or fairly implied in or incident to the powers expressly granted, * * * ."

The Supreme Court of Missouri has also said that

the powers of county courts are limited and defined by statutes and the acts outside of and beyond statutory authority are void.

The Supreme Court of Missouri, in the case of Morris v. Karr, 114 S. W. (2nd) 962, said at l.c. 964:

> "In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.'

The only authority given the counties by the Liquor Control Act is contained in Section 25, Laws of Missouri 1935, page 276. The applicable part of this section reads as follows:

> "In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license)

> as the county court, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine * * * * *."

It will be observed that the counties by and through their county courts, are authorized to enter an order of record requiring license holders to pay into the county treasury of the county "wherein the premises described and covered by such permit or license are located" certain fees which shall not exceed the amount charged by the State of Missouri. This right, however, is given to the counties only when the premises described in the license are located within the confines of the particular county. Nowhere is such a right given to the county when none of the premises are located within its limits.

A similar situation was before the St. Louis Court of Appeals in the case of Fischbach Brewing Company v. City of St. Louis 95 S. W. (2nd) 334. In that case, the Board of Aldermen of the City of St. Louis passed an ordinance pursuant to the supposed authority given the city by said Section 25 of the Liquor Control Act. The ordinance purported to exact license fees from a manufacturer of beer which manufactured its product in another city and which had no established place of business in the City of St. Louis. In other words, the city by ordinance attempted to impose a license fee on a manufacturer or brewer of beer for the privilege of selling to wholesalers within the City of St. Louis, although the brewery had no "premises" whatsoever within the city limits. In holding that the city had no authority to pass such an ordinance or impose any such license fee because this right had not been given the city by the state law, the court said l.c. 338:

> "It is charged in the petition, and urged by plaintiff in its brief, that section 10 of Ordinance No. 40274 of the city of St. Louis, hereinbefore set out, is broader than, and inconsistent with, the provisions of said section 25 of the Liquor Control Act as originally enacted

and by reason thereof the city of St. Louis is without power or authority to enforce such ordinance requiring the plaintiff to pay a license fee to sell and deliver its beer in the manner and under the circumstances alleged in the petition to retailers in the city of St. Louis or requiring the plaintiff to take out any merchant's license for the sale of its product in the city of St. Louis.

The determination of this question necessarily involves the meaning and proper interpretation of said section 25 of the Liquor Control Act. Putting ourselves as near as humanly possible in the position of the makers of the law at the time of its enactment and taking into consideration the surroundings and contemporaneous and prior history, we are forced to the conclusion that the primary and principal objective of the lawmakers was to raise much needed revenue and to stimulate and encourage the establishment and maintenance of brewery plants in order to meet, to some degree, the distressing and pressing problem of state-wide and nation-wide unemployment. The great depression which had been in existence, and which, probably, reached its worst stages in the year 1933, had dried up many sources of the supply of necessary revenue to finance the state and local governments and all of their usual and varied activities. The same year of 1933 witnessed the repeal of the Eighteenth Amendment, by the archaic and cumbersome method in vogue, resulting in the adoption of the Twenty-First Amendment to the Federal Constitution. Therefore, the states which, like Missouri, passed laws in harmony with the changed conditions growing out of the abrogation of the Eighteenth Amendment, found opened up to them a great field for securing much needed revenue from intoxicating liquors, which had been denied to them for years theretofore.

Now, if the construction to be placed on section 25 of the Liquor Control Act should be that the manufacturers or brewers of beer located in one municipality could not sell their products by wholesale in any other municipality in the state without paying a heavy license fee so to do, imposed by each and every municipality in which they might seek to dispose of their manufactured products, it is very apparent that such manufacturers or brewers could not successfully remain in business, as they could find no outlet for their products and this result would necessarily defeat what is apparent were the main objectives of the lawmakers at the time of the enactment of said Liquor Control Act. The hoped for revenue which the legislators had in mind would not, and could not, of course, materialize, and, likewise, their other objective of furnishing employment for the unemployed would fall by the wayside. The need for more revenues was pressing; shrinkage in values, by reason of the stagnation in business, made the payment of taxes very burdensome and onerous, and, in many cases, impossible, so that laws creating moratoriums on foreclosures and granting relief to overburdened taxpayers were enacted in many states of the American Union. Such a construction would necessarily defeat the very objects which the lawmakers obviously had in mind at the time. So that, when we view all the surrounding circumstances we see a reason for not giving this construction to the provisions of said section 25 of the Liquor Control Act. A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason. The benign objectives heretofore pointed out

were surely within the legislative intent as shown by all the surrounding circumstances covering the period in which this law was enacted. Rutter v. Carothers, 223 Mo. 631, 643, 122 S. W. 1056; State ex rel. Emmons v. Farmer, 271 Mo. 306, 316, 196 S. W. 1106; Stack v. General Baking Co., 283 Mo. 396, 411, 223 S. W. 89; State ex rel. Taylor v. Daues, 313 Mo. 200, 211, 281 S. W. 398. The insertion of the word 'located' in section 25 of the Liquor Control Act by the next General Assembly was to make clear the legislative intent in enacting the original section, that a city should not be authorized to exact any license fee from a manufacturer or wholesaler having no place of manufacture or established place of business in said city. 2 Sutherland on Statutory Construction (2d Ed.) p. 777, Sec. 401; Hugo v. Miller, 50 Minn. 105, 52 N. W. 381, loc. cit. 383; 25 R.C.L. p. 1064, Sec. 288; United States v. Freeman, 3 How. 556, 564, 565, 11 L. Ed. 724, 728. It follows therefore, that the plaintiff, by the terms of its petition, having no place of manufacture or established place of business located within the limits of the city of St. Louis, was not included in the class enumerated in the statute. Following out this construction of said section 25 of the Liquor Control Act, it follows that the Legislature necessarily excluded and withheld from every municipality of the state the right to exact any license fee whatsoever for the manufacture or sale of intoxicating liquor from any person or corporation not embraced within any of the classes there specifically enumerated or not located within the corporate limits of such municipality, thus falling under the rule of statutory construction of expressio unius est exclusio alterius. State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270

> Mo. 685, 688, loc. cit. 692, 195 S. W. 714.
>
> In so far as section 10 of said ordinance of the city of St. Louis purports to require a manufacturer of intoxicating liquor, whose plant is located in another municipality, to take out such license, it is broader than the state law, and, therefore, null and void, as being contrary to the legislative policy of the state, * * * ".

It follows, therefore, that if the "premises" of any distilling company are located outside of Jasper County, the court has no authority to charge a license fee.

You also ask whether $300 is an excessive charge. As stated above, if the "premises" are not located within the county, then no fee can be charged. However, if the distillery is located within Jasper County, then it appears that the fee is not excessive. Section 25 authorizes the counties to charge a fee when the premises are located within the county "not in excess of the amount by this act required to be paid into the state treasury for such state permit or license." The state, under the terms of Section 21 of the Liquor Control Act, Laws of Missouri 1937, page 529, charges a distiller $200 for the privilege of distilling or manufacturing, and a further sum of $250 for a solicitor's permit authorizing the distillery to solicit and sell to wholesalers. The applicable parts of said Section 21 read as follows:

> " * * for the privilege of manufacturing, distilling or blending intoxicating liquor of all kinds within this state the sum of two hundred ($200.00) dollars; * * *
>
> * * for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors of all kinds, to, by or through

> a duly licensed wholesaler within this state, the sum of two hundred fifty ($250.00) dollars; * * * * ."

Therefore, a distiller, under such circumstances, would pay the state the sum of $450 for the privilege of distilling and selling to wholesalers only, and the $300 fee the county court has provided is within that figure. The above quoted parts of Section 21 apply only to distillers and do not apply to brewers of beer. As we understand your request, you have in mind only distillers. Other parts of Section 21 provide the fees applicable to brewers.

CONCLUSION

We are of the opinion that a county court has no authority to make an order requiring distillers to pay a license fee to the county for the privilege of selling intoxicating liquor to wholesalers when the distiller is not engaged in manufacturing his product within said county and has no "premises" whatsoever located therein. The county can charge and collect a license fee from distillers whose premises are located within the confines of the county and the only restriction imposed by law under such conditions is that the amount of the fee shall not be in excess of the amount required to be paid into the state treasury for a state permit.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
JFA:RT

COUNTY COURTS: Contract made by county court and collector giving ten per cent contingent fee to attorney for collecting
COLLECTORS: delinquent liquor license and merchants' license taxes is illegal.

June 27, 1940

6-28

FILED
28

Mr. Harold Fenix
County Collector
Jasper County
Carthage, Missouri

Dear Sir:

We have received your letter of June 8th, which reads as follows:

"Enclosed please find a copy of a contract made and entered into, on the 30th day of November, 1939, between Nelson Evans, an attorney of this city, and me as Collector of Revenue for Jasper County, Missouri, and approved by the County Court of Jasper County, Missouri. This contract provides in substance that Mr. Evans, as attorney, may retain 10 per cent of collections made on delinquent liquor license. The contract also mentions merchant's license, but no payment of any 10 per cent has been made to him on any merchant license.

We request an opinion from you as to whether this contract is valid, and whether it protects me as County Collector of Revenue.

I note that by Section 25, Laws of Missouri for 1935, page 276, that counties are given authority to license these businesses, and it states that the holder of a permit or license shall pay the fee into the County Treasury. It makes provision in the latter part of the section for the collection of such license, but this seems to be limited

to cities.

Will you specifically advise whether if I deducted 10 per cent of the money collected on delinquent licenses, and pay it directly to Mr. Evans, I will be protected from any claim made by the County Court, now, or in the future, particularly upon the making of an audit of my office."

It is unnecessary to further set out the terms of the contract, which is two pages in length, since you have accurately described its terms in your letter. Briefly stated, the exact question you ask is whether a county collector, with the approval of the county court, may enter into a valid contract with an attorney whereby the attorney agrees to collect delinquent merchants' license and liquor license taxes and retain ten per cent of the collections as his fees.

We are of the opinion that neither you, as the collector, nor the county court has the authority to enter into such a contract. We have examined the Liquor Control Act and also the laws providing for merchants' licenses, and we find no statutory authority authorizing the employment of an attorney either on a contingent fee basis or otherwise for the collection of such delinquent taxes. The law does authorize the appointment of an attorney to collect the delinquent real property taxes, as well as personal property taxes, but we find no law authorizing such an appointment and contract in connection with delinquent license taxes of the kind you mention. In this connection, it has long been the law in this state that the county court, as well as the county officers, is not the general agent of the county and its powers are limited to those expressly granted by law, and that the acts of the county court are void when done with no statutory authority whatsoever. This rule is announced by the Supreme Court in the late case of Morris v. Karr 114 S. W. (2nd) 962, in the following language, l.c. 964:

"In Sturgeon v. Hampton, 88 Mo. 203,

> at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

In the case of King vs. Maries Co. 249 S. W. 418 (Sup. Ct. of Mo.) the owner of a set of abstract books brought suit against Maries County and the individuals composing the county court to recover $654.00 alleged to be due for making and delivering a list of all names of owners and true descriptions of lands, embraced in one hundred eighty four separate tax bills, at the rate of $3.50 for each tax bill. The county court by order had agreed to pay these amounts. No statute then existed authorizing such a contract or expenditure. In disallowing the claim, the court said, l.c. 420:

> "The action of the county court assumed to cast upon the county an unauthorized charge. 'This state, by law, has made ample provision for the collection of its revenue for all purposes. In the exercise of its prerogative, it makes use of certain officials, designated as county officers, to whom are assigned specific duties, and, among others, the county courts. But this statute confers no power upon the county court to cast upon the county the burden or cost of such collection.' Butler v. Sullivan County, 108 Mo. loc. cit. 638,

18 S. W. loc. cit. 1144, and in the same opinion, 108 Mo. loc. cit. 637, 18 S. W. loc. cit. 1144. 'Besides the revenue law is, in itself, a complete system prescribing service, and providing compensation for such service, and such compensation is necessarily exclusive. Hubbard v. Texas Co., 101 Mo. 210; Harris v. Buffington, 28 Mo. 53.'"

CONCLUSION

It is our conclusion, therefore, that since the county courts, as well as other county officers, are not general agents and have no authority except that which is expressly granted them by statute, and since no statute gives the right to either the county courts or county collectors to employ an attorney on a contingent fee basis, or otherwise, to collect delinquent liquor license and merchants' license taxes, that said officers, including the county court as such, are without authority to enter into or approve any such contract.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
JFA:RT

SCHOOLS: Interpretation of meaning of "incidental expenses" as same appears in Section 13a, Laws of Missouri, 1939, page 718.

January 5, 1940

1-6

FILED
30

Mr. Omer Foley
County Superintendent
Howard County Public Schools
Fayette, Missouri

Dear Sir:

We are in receipt of your letter of January 1, 1940, wherein you states as follows:

> "In re: H. B. 370 revising section 13a, 1931 School Law, found on page 718 Laws of Missouri, 1939:
>
> Beginning on line number nine (9)--, and maintenance shall be construed as including only teachers' wages and incidental expenses:
>
> The question arises just what items shall be called incidental expenses? Would you class: painting exterior, papering or painting interior, repairing schoolhouse in general, stoves or heaters or the purchase of same, repairing or building outbuildings, putting in electric lights under REA, changing the lighting from cross lights, etc. as falling under this section?"

Laws of Missouri, 1939, Section 13a, page 718, to which you refer, provides in part:

> " * * * * * * maintenance shall be construed as including only teachers' wages and incidental expenses: * * * * * *"

Webster's New International Dictionary, Second Edition, defines the term "incidental" as:

> "* * * * * casual; hence not of prime concern; subordinate; as, an incidental expense.

Funk and Wagnall's New Standard Dictionary of the English Language defines the term:

> "* * * * * especially a minor or casual expense or item: * * * * *"

There is a well-defined rule of statutory construction that non-technical words in a statute are to be construed in their plain and usual sense. Kinyon v. Kinyon, 71 S. W. (2d) 78, 230 Mo. App. 623.

Applying the above rule, we are of the opinion that the words "incidental expenses", as used in Section 13a, supra, authorize the expenditure of funds for only minor and casual expenses and do not permit expenditures for "painting exterior, papering or painting interior, repairing schoolhouse in general, stoves or heaters or the purchase of same, repairing or building outbuildings, putting in electric lights under REA or changing the lighting from cross lights."

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

WJB:VC

Buyer and seller commits crime when no title to an automobile is passed.

CRIMINAL LAW: Violation of Section 7774, Subsection (c) Laws of Missouri, 1939, page 519-520 is a crime and a criminal prosecution will lie against either buyer or seller.

January 13, 1940

1-15

FILED
31

Hon. Arkley Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated January 9th, 1940, which reads in part as follows:

> "I would like very much to have an opinion from your office upon the following question: Will a criminal prosecution lie against one who either buys or sells an automobile under sub-section (c) of Sec.7774 R. S. 1929 who when there is an understanding between the parties to the transaction that no title to the automobile is to be passed between the parties?"

Section 7774, Subsection (c), Laws of Missouri, 1939, pages 519-520, reads in part as follows:

> "* * In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment

> thereof, with warranty of title in form printed thereon, and prescribed by the commissioner, with a statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer. * * * "

The above portions of Section 774 clearly require an assignment of the certificate of ownership (commonly called "title") whenever there is a sale or transfer of ownership of the vehicle. They further provide that it shall be unlawful for the buyer or seller to fail to comply with the provision as to the assignment and passing of the certificate of ownership. The penalty section of our Statutes referable to Section 7774, supra, is Section 7786 R. S. Missouri, 1929, Subsection (d) which reads as follows:

> "Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

The above provisions are clear and unambiguous, and there is no room for construction.

CONCLUSION

It is therefore the opinion of this Department that

a criminal prosecution will lie under Section 7774, Subsection (c), Laws of Missouri, 1939, pages 519-520, for failure to comply with its terms.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

CRIMINAL LAW: The drawer of a check upon a bank in which he has no funds, under certain circumstances is guilty of a felony under Section 4304 R. S. Missouri, 1929. Form of information.

January 25, 1940

1-26

FILED
31

Hon. Arkley Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 23, 1940, which reads as follows:

> "I would like to have an opinion from your office upon the following question: Is one guilty of a felony under Sec. 4304 Revised Statutes 1929 if he gives a check drawn by himself upon a banking corporation in which he has no account? I have been unable to find a decision holding that it is a felony to obtain money in such manner in this State. Recently in this county I have had several checks that came into my office of this nature.
>
> "If, in the opinion of your office one is guilty of a felony for obtaining money under such circumstances I would certainly appreciate it if you would send me a form of an information to use in such cases. From my reading of the cases construing this section it seems to me to be a rather difficult matter to charge a violation under this section."

Section 4304 R. S. Missouri, 1929, reads as follows:

> "Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

The punishment only provides for a penitentiary sentence and is therefore a felony statute. It will be also noticed that this Section is really different from the title of the section, in that it amounts to obtaining money under false pretenses. It describes the different instruments or ways used in obtaining money under false pretenses: Among those mentioned is "trick", "deception", "fraudulent representation", "statement or pretense", the "confidence game" and the method

which you describe in your request, which is "by means of a check drawn with intent to cheat and defraud, on a bank in which the drawer of a check knows he has no funds." The authorities hold that the mere fact that a person draws a check on a bank in which he knows he has no funds is not in itself a felony under this section. The only way that a conviction on a felony can be had under this section on a check, would be a conviction which contains all of the elements of an information for obtaining money or property under false pretenses. You ask in your request for a form of an information to be used where a check is the principal false token in a crime committed under Section 4304, supra. It would be impossible for this office to draw an information under this section, for the reason that all the facts and circumstances would be different in each information or indictment. But in the case of State v. Loesch, 180 S. W. 875, l.c. 878, par. 5, the court specifically states what is necessary in an information under Section 4765, R. S. Missouri, 1909, which is now Section 4304 R. S. Missouri, 1929, supra. In paragraph five the court in that case states:

> "Allegations covering the essentials herein stated appear in the information: The name of the defendant; the venue of the crime (State v. Terry, 109 Mo. 601, 19 S. W. 206); the date of its commission; that it was committed feloniously with intent to cheat and defraud (State v. Martin, 226 Mo. loc. cit. 548, 126 S. W. 442; State v. Woodward, 156 Mo. 143, 56 S. W. 880; State v. Scott, 48 Mo. 422); the names of the parties to whom the false pretenses were made (State v. Samuels, 144 Mo. 68, 45 S. W. 1088; State v. Chissell, 245 Mo. loc. cit. 557, 150 S. W. 1066); their ownership of the property, its description and

value (State v. Myers, 82 Mo. 558, 52 Am. Rep. 389; State v. Vandenburg, 159 Mo. 230, 60 S. W. 79; Halley v. State, 43 Ind. 509; State v. Ladd, 32 N. H. 10); the nature of the trick or fraud committed by defendant described with certainty (State v. Porter, 75 Mo. 171; State v. Miller, 212 Mo. 73, 111 S. W. 18); that the pretenses made were false, and defendant's knowledge of their falsity when made (State v. Janson, 80 Mo. 97; State v. Bradley, 68 Mo. 140); that the parties defrauded relied upon and believed in the truth of the pretenses made by the defendant, and were thus induced to and did part with their property (State v. Kelly, 170 Mo. 151, 70 S. W. 477; State v. Hubbard, 170 Mo. 346, 70 S. W. 883; State v. Vorback, 66 Mo. 168; State v. Evers, 49 Mo. 542); that the pretenses were designedly (State v. Wilson, 143 Mo. 334, 44 S. W. 722) made by the defendant, and by the means thereof he did feloniously obtain and receive from the parties named the property described, with the intent to cheat and defraud them of same (State v. Barbee, 136 Mo. 440, 37 S. W. 1119). The foregoing allegations, which are formally pleaded, are sufficient to charge an offense under section 4765, R. S. 1909, and the defendant will not be heard to complain that he has not been informed as to the nature and cause of the accusation against him. State v. Foley, 247 Mo. loc. cit. 628, 153 S. W. 1010; State v. Lovan, 245 Mo. 516, 151 S. W. 141; State v. Donaldson, 243 Mo. 460, 148 S. W. 79."

It will be noticed in that paragraph that the court specifically states that the information should contain "the nature of the trick or fraud committed by defendant described with certainty." In that part of the information it would be necessary to set out the check in verbatim and also the conversation that ensued at the time the check was presented, and other matters which would specifically notify the defendant with what he is charged.

Information on obtaining money under false pretenses, which is under Section 4304, supra, are never alike, for the reason that different facts, conversations and actions of all parties concerned are always different; but if you followed the law, as set out in State v. Loesch, supra, the facts can be fitted to contain each allegation that is necessary in the information. This case has been followed since the time that the opinion was rendered by Walker, J., until the present time, and has not been overruled. Criminal actions on obtaining money under false pretenses are very hard to prove, for the reason that there are so many different allegations that must be specifically alleged and proved before a conviction can be had. This will be noticed in the following cases which I am including so that you may read all of the cases in order that you will be better informed to follow the holding in State v. Loesch.

In the case of State v. Mullins, 237 S. W. 502, l.c. 503, the court said:

> "Here was a charge that the defendant had told Mrs. Blunt that the check which he gave her would be paid. It is apparent upon the face of the record and the evidence presented that this was the very statement upon which she relied in parting with the mules. The law is well settled upon

> that subject--that a promissory statement does not come within the statute relating to false pretenses. The false pretense must be a misrepresentation of some fact. * *."

The court also, in the same case said:

> "It may be urged that presentation of a check drawn on the bank was prima facie a representation that the defendant had funds there. The Legislature of 1917 (Acts 1917, p. 244) passed an act incorporated in the statutes of 1919 as sections 3553 and 3554. Section 3553 relates to the offense of drawing a bogus check or checks upon a bank with insufficient funds to meet it. It will be noted that the defendant was not prosecuted under that section but under section 3343, a general statute relating to the obtaining of money by false pretenses.
>
> "Section 3554 is as follows:
>
> "'Sec. 3554. Notice-Five Days-How-Evidence. As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depositary, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon(together with the drawee thereof the amount due thereon), together with all

costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.'

"Under that section the drawing of a check upon a bank in which the drawer has no funds would be prima facie evidence of intent to defraud unless within five days after notice of dishonor the drawer should make the drawee whole. * * ."

In the case of State v. Robinson, 14 S. W. 2d 452, the court set out the facts as follows:

"The defendant was charged by information in the circuit court of Ozark county jointly with one Dan Lewis with having cheated and defrauded W. E. Jarmon of personal property of the value of $155.90, by means of a false and bogus check. Upon a trial to a jury he was convicted and his punishment assessed at three years' imprisonment in the penitentiary."

But the court further said:

"The essentials to a charge under the statute(section 3552, R. S. 1919), here alleged to have been violated, are set forth with particularity in State v. Loesch (Mo. Sup.) 180 S. W. 875, 878, and cases. Among others the allegation is required to be made that the party defrauded relied upon and believed in the truth of the pretenses made by the defendant and

> was thus induced to and did part with his property. This allegation is omitted from the information. Later cases affirm the ruling in the Loesch Case. State v. Mills, 272 Mo. 526, 199 S. W. 131; State v. Burton (Mo. Sup.) 213 S. W. 424. This error will necessitate a reversal."

It will be noticed under the above case that this was an action brought by reason of a check being drawn on a bank where there was no account, but the court held that in order for a conviction to be had, all of the essential elements of obtaining money under false pretenses must be alleged and proved. It also mentions other cases affirming the ruling in the Loesch case, supra.

Also in the case of State v. Workman, 199 S. W. 131, the court sets out the statement and ruling as follows:

> "The appellant and one L. B. Burton were charged in an information filed by the prosecuting attorney of Johnson county with having, with intent to cheat and defraud, drawn a check upon a bank in which they knew they had no funds, in violation of the act approved March 25, 1913 (Laws 1913, p. 222). Burton was granted a severance. Upon a trial of appellant he was convicted and sentenced to two years' imprisonment in the penitentiary, and from this judgment he appeals.
>
> "The provisions of the act, so far as applicable to the offense are as follows:
>
> "'Every person who, with the intent to

cheat and defraud, shall obtain, or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever * * * by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds. * * * shall be deemed guilty of a felony, and upon conviction punished by imprisonment in the * * * penitentiary * * * not exceeding seven years.'

"The sufficiency of the information is challenged on a number of grounds. In State v. Loesch, 180 S. W. 875, and in State v. Young, 266 Mo. 723, 183 S. W. 305, following State v. Evers, 49 Mo. 547, we defined with great particularity the averments necessary to be employed in a charge of the nature of the one here under consideration. Prolix and abounding in involved allegations as is the charge here made, it sufficiently conforms to the requirements stated in the cases referred to, except that it fails to allege that the American Trust Company, charged to have been cheated and defrauded, believed the false pretenses made to be true, and was thereby deceived, and thus induced to part with its property."

In the above case the court still held that in a case where a check was drawn upon a bank in which they knew they had no funds, the information should be drawn, and contain the same elements as obtaining money under false pretenses.

The proper and mostly followed procedure is that

under Section 4305, R. S. Missouri, 1929, which does not come within the decisions of the Supreme Court, that the allegations as set out in obtaining money under false pretenses should be proven. Section 4305, supra, applies to the drawing of checks with intent to defraud upon a bank where the account is insufficient. The courts have also held that where no account is in the bank, that this section can apply, for the reason that there is an insufficient amount of money in the bank to cover the check. I am enclosing a copy of an information which has been approved and can be used under Section 4305, supra. Of course, this information cannot be used until the procedure set out in Section 4306 and 4307 R. S. Missouri, 1929, is followed.

A similar form of information which under some circumstances may be used under Section 4304 R. S. Missouri, 1929, is as follows:

"Carl F. Wymore, Prosecuting Attorney within and for the body of the County of Cole and State of Missouri, under his official oath and according to his best information, knowledge and belief, informs the court that one _____, on the ___ day of _____, _____, at the City of _____, County of Cole, State of _____, did unlawfully, feloniously, knowingly and designedly with the intent then and there to cheat and defraud one _____, did falsely and fraudulently represent, pretend and state to the said _____, that he the said _____, had lawful money of the United States deposited to his credit in the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of _____, and that said money was subject to be checked

out of said bank, and that he had sufficient money deposited in said bank to purchase and pay for _____ of the value and purchase price of _____ Dollars, and the said _____ further falsely pretended and represented to the said _____(herein set out other evidence, if any, of the nature of the trick or fraud committed by defendant described with certainty), that the said _____, believing the said false pretenses and representations so made by the said _____, and being deceived thereby, was by reason thereof then and there induced to sell and deliver to the said _____, _____ the personal property of _____ for the purchase price of _____ Dollars and the said _____ gave the said _____ his _____ personal check for the above amount drawn on the 'Bank of _____', in payment for said _____ and the said _____ relying upon the statements so made by the said _____, and believing them and each of them to be true, then and there accepted said false and bogus check in payment of the purchase price of said _____ and delivered the said _____ to the said _____, and the said _____ presented said false and bogus check at the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of Missouri for collection and payment at the 'Bank of _____', and the payment was refused by said 'Bank of _____', because the said _____ had no funds in said bank,

and the said _____ by means of said false pretenses and representations so made to the said _____ as aforesaid, unlawfully, feloniously, knowingly and designedly did then and there obtain from the said _____ the possession of the said _____ of the value of _____ Dollars of the moneys and property of the said _____ with the intent then and there unlawfully and feloniously the said _____ to cheat and defraud of the same. Whereas, in truth and in fact the said _____ did not have any money in the 'Bank of _____', (herein set out other clauses, if any, negativing the truth of the alleged statements and representations charged to have been made by the defendant) all of which he the said _____ then and there well knew the said false representations, statements and pretenses made as aforesaid to be false; against the peace and dignity of the state."

CONCLUSION

In view of the above authorities, it is the opinion of this department that one is guilty of a felony under Section 4304 R. S. Missouri, 1929, if he gives a check drawn by himself upon a banking corporation in which he has no account under such circumstances that would be a violation of all the elements of obtaining money under false pretenses.

It is further the opinion of this department that the mere giving of a check drawn by anyone upon a banking corporation in which he has no account, where all the elements of obtaining money under false pre-

tenses are not present, he would be guilty under Section 4305 R. S. Missouri, 1929, which is drawing a check with intent to defraud and is only a misdemeanor, providing five days' notice has first been given the maker or drawer of the check, by the drawee, and the check has not been redeemed or paid.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

COUNTY COURTS:
PAYMENT OF JUDGMENTS: County court may be compelled by mandamus to issue warrants in payment of judgments if money for payment of same is available.

February 10, 1940

2-14

FILED
32

Mr. Ermer J. Garner, Deputy Clerk
Circuit Court of Stoddard County
Bloomfield, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you requested an official opinion from this department based on the following statement:

> "On January 12, 1940, I obtained a judgment in this Court, against Stoddard County, Missouri, for due and unpaid salary, as deputy Circuit Clerk, of Stoddard County, Missouri, salary having been earned in year 1935, in the sum of $249.91, together with interest.
>
> "I would appreciate very muchhaving your opinion as to whether I would be entitled to and be able to obtain a warrant from Stoddard County, Missouri, in the amount of the judgment rendered by the Circuit Court of Stoddard County, Missouri, in my favor, as aforesaid.
>
> "Please let me have your opinion on this soon."

I note in your letter that the judgment which you have is based on the claim for salary for the year 1935. Your request does not indicate whether or not there was a balance carried over from the year 1939 into 1940. However, your letter indicates that the judgment which you have was obtained on January 12, 1940,

and we are assuming, for the purpose of this opinion, that this judgment is final.

County courts are only authorized to issue warrants by virtue of the provisions of the statute and within the constitutional limits. Section 12 of Article X of the Constitution clearly shows that the framers of that article intended that the county operate on a cash basis. A legislation to that effect has also been passed. In Section 9867, R. S. Missouri 1929, it is provided as follows:

> "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

And in the case of State ex rel. Philpott, Collector of Revenue, v. St. Louis-San Francisco Ry. Co., 247 S. W. 182, it was held that the term "current county expenditures" means the expenditures for the year for which the taxes are levied.

Under the County Budget Act, Laws of Missouri 1933, page 340, and in Section 5 thereof, l. c. 344, the current expenditures of the county are divided into five classes. This section provides as follows:

> "The court shall show the extimated expenditures for the year by classes as follows:
>
> "Class 1: Care of paupers declared

by lawful authority to be insane (in state hospitals).

"Class 2: Repair and upkeep or replacement of bridges on other than state highways and not in any special road district. List bridges.

"Class 3: Expense of conducting circuit court and election, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 3 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years

"Class 4: Pay or salaries of officers and office expense. List each office separately and the deputy hire separately

"(County clerk shall prepare estimate for the county court but his failure does not excuse the court)

"Class 5: Contingent and emergency expense, not to exceed one-fifth of the total estimated revenue to be received. Purposes for which the court proposes the funds in this class shall be used shall be shown.

"Class 6: Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until

> all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

Class 6 of the foregoing section indicates that outstanding warrants may be paid out of that class. Of course, if a person has a judgment on an outstanding warrant, we think it would take the same classification. But the first five classes of Section 5, supra, include the expenses which are necessary to operate the county for each particular year and those are the current county expenditures which are taken into consideration when the county levy is made under said Section 9867. If the county has outstanding obligations, which would not be classed as current county expenditures, then we think that the lawmakers, under Section 9868, R. S. Missouri 1929, made provision for the payment of such claims on judgments. This section provides as follows:

> "No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.: The

prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state,

> or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

We think that your judgment could be taken care of by moneys derived from the levy authorized under the foregoing section provided the county court, circuit court and the prosecuting attorney see fit to make such a levy.

Section 12167, R. S. Missouri 1929, provides as follows:

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Under this section, if at the end of the year a surplus should remain in any one or more of the funds listed as current county expenditure funds, the county court, for the purpose of paying a judgment, might transfer all of these funds to Class 6 and pay your judgment from that fund. Of course, the right to make such transfer would depend upon whether or not all warrants issued for current county expenditures had been paid and all outstanding warrants which pre-dated your judgment had been paid.

CONCLUSION.

From the foregoing it is the opinion of this department that the county court may, at the end of the current year, pay your judgment out of any balance

which remains in county revenue provided all claims against that fund have been paid, and providing all warrants or judgments pre-dating the current year and pre-dating your judgment have been paid.

We are further of the opinion that under Section 9868, R. S. Missouri 1929, that the county court, prosecuting attorney and circuit court would be authorized to make a special levy, the funds from which may be used to pay this judgment providing the judgment is valid.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

CRIMINAL LAW: A criminal action may be filed against a tavern owner who maintains a public nuisance under Section 4347.

February 21, 1940

2-23

FILED 32

Hon. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated February 17, 1940, which reads as follows:

> "I would like for you to give me an official written opinion as to the law covering the following facts:
>
> "There is a small business located in rural Moniteau County which is being operated as a soft drink parlor and sandwich shop. There is maintained in connection with this shop a dance floor. Patrons from all parts of the county frequent this place and there is considerable drinking done on the outside on the premises of this shop. There is an average of from one to two fights every week. These patrons will go on the outside on the roadway adjoining the premises and drink and mix drinks. Bottles are thrown upon the highway and land adjoining the highway, considerable cursing and profanity are engaged in by these patrons. All of this taking place in front of the shop and on the road-way.

"A number of complaints have come to this office by citizens of this community that it is a nuisance. I am wondering if under these facts this place can be described as a public nuisance under Section 4347, R. S. 1929, and can be declared to be a public nuisance under that act."

Section 4347 R. S. Missouri, 1929, reads as follows:

"Every person who shall erect or maintain any public nuisance not specified in the four next preceding sections, to the annoyance or injury of any portion of the inhabitants of this state, shall be deemed guilty of a misdemeanor: Provided, however, that the establishment, transaction or carrying on of any legitimate business or business of utility, not detrimental to the neighborhood, shall not be prohibited and the question as to whether or not such business is a legitimate business or one of utility is hereby declared to be a judicial question; and provided further, that nothing herein contained shall be so construed as to prevent reasonable regulation of or the licensing of any business or calling within the state or by any municipal authority or municipality, but the reasonableness of any such regulation or licensing shall be a matter to be determined by a court of general jurisdiction."

It will be noticed under the above section that it includes public nuisances not specifically set out in the four preceding sections which are in reference to slaughter houses, soap and other factories, excessive smoke and keeping stallions and jacks from view of the public. Although Section 4347, supra, provides for the punishment of maintaining any public nuisance, it does not prohibit the prosecution of certain nuisances which were punishable under the Common Law. In the case of State v. Boll, 59 Mo. 321, l.c. 323, the court said:

> "As to the other point, the provisions of the statute in regard to nuisances do not undertake to cover all cases of public nuisance, and as to those not provided for by statute, the common law remains in force. This principle is recognized as to other common law offenses, belonging to a general class, in regard to some of which provision has been made by statute, in the case of the State vs. Appling, (25 Mo., 315) and the State vs. Rose (32 Mo., 560). The case at bar does not come within any of the statutory provisions cited above, but the facts charged constitute an offense at common law."

Of course most nuisances are governed primarily by the facts in each case which is a matter of law to be first passed upon by the court. To be a nuisance and be punishable under Section 4347, supra, it must be a nuisance that annoys or injures a portion of the inhabitants of the state and not just an individual.

In the case of State v. McIntyre, 277 S. W. 571, l.c. 572, the court said:

> "* * To sustain the offense charged

> in the indictment the evidence must disclose such an offense as would be intended to annoy the whole community in general and not some particular person. Even treating the admission of the evidence as to what took place in the yard as competent, it is hardly sufficient to sustain the charge in the indictment. No persons of ill repute congregated at the McIntyre home. There was not a single immoral act shown to have taken place in that home, and the fact that Mrs. McIntyre exposed her person twice in one year in a tantalizing manner toward the prosecuting witnesses, Lovelace and his wife, would hardly sustain the charge of maintaining a common nuisance, especially when it was in her back yard, and evidently intended to annoy only Lovelace and his wife."

In this case the court refused to affirm the verdict of a fine found by a jury, for the reason that the annoyance or injury under which the action was brought did not offend the public or a part of the inhabitants, but only affecting a family adjoining the place where the nuisance was alleged to have been committed.

Section 4347, supra, was passed upon in the case of State v. Brown, 66 Mo. 280, l.c. 281, which section was referred to as Section 3851 R. S. Mo., 1889, and in which case a copy of the information is set out. Section 3851 R. S. Missouri, 1889, as mentioned in the above case was repealed but reenacted by the Laws of 1925, page 123, by adding provisions. In that case the fine was affirmed by the court of appeals but was on a question of fact as to a factory. In that case the court said:

"The count in question is framed under section 3851 of the Revised Statutes of 1889, which is to wit: 'Every person who shall erect or maintain any public nuisance not specified in the four next preceding sections, to the annoyance or injury of any portion of the inhabitants of this state, shall be deemed guilty of a misdemeanor.'

"It is objected to this count that it does not aver that the persons alleged to have been damaged were inhabitants of the state, and also that it uses the words 'great damage and common nuisance,' instead of 'annoyance or injury,' in describing the effect of the acts complained of. The count in question, omitting formal parts and the allegations of venue, is as follows: 'That the said Thornton L. Brown and William S. Thompson, on the days and times, and during the period aforesaid, willfully and unlawfully did deposit, place and store, and cause and permit to be deposited, placed and stored, in, about and upon the certain building, buildings and premises, known and designated as the "Crystal Soap Works," and then and there used and occupied by said Thornton L. Brown and William S. Thompson, and the premises adjacent thereto, large quantities of garbage, offal and other filth, in a decomposing, malodorous and stenchy condition, and there render the same; whereby divers noisome and unwholesome smells from the said garbage, offal and other filth, so decomposing as

> as aforesaid, and from the rendering of the same, then and on said other days and times did arise; so that the air was then and on the said other days and times then (there) greatly corrupted and infected; to the great damage and common nuisance, not only of the said August Rediger, William F. Krueger and other complainants, but all the people there lawfully being and residing, and going and returning and passing over and along said public road and highway; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state.'"

CONCLUSION.

In view of the above authorities, it is the opinion of this department that under the facts stated in your request an information may be filed charging the owner or owners of the small business located in rural Moniteau County with maintaining a public nuisance, under Section 4347 R. S. Mo., 1929, but it is still a question of fact as to whether or not under the facts a nuisance has been committed to the annoyance or injury of a portion of the inhabitants of this state. The information may be filed, but it is a question of fact as to whether or not the defendant or defendants are guilty of maintaining a nuisance.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

PEDDLERS: Each employee selling wares of bakery at retail from truck must have state license and may be required to get county license if court so orders.

April 3, 1940

FILED
32

Hon. A. L. Gates,
Prosecuting Attorney,
Moniteau County,
California, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 15, 1940, which is as follows:

"I desire and request an official written opinion from your department concerning the following facts.

A baking company in Jefferson City, Missouri, owns and operates numerous trucks, two of which are operating in Moniteau County. These trucks have a regular route on which they sell at retail to customers, namely, patrons at their homes, bread and pastries. The drivers of these various trucks are the agents of the baking company. Is the baking company required to pay a State baking license on each individual agent operating or will the baking company with the payment of one bakery peddler's license meet with Sec. 13,318 R. S. 1929?

Also, can the said company operate more than one truck as a peddler, if he be one, in one county and pay only one county peddler's license? Or is the baking company required under Sec. 13,318 R. S. 1929 to pay a state peddler's

license for each agent regardless of where he may be operating in the State and a County peddler's license for each agent in the county in which the various agents may be operating?"

Section 13312 R. S. Mo. 1929 defines a peddler and the definition given clearly includes a bakery that sells its products at retail from a truck that goes about the country. Section 13313 R. S. Mo. 1929 provides in part that "no two or more persons shall deal under the same license, either as partners, agents or otherwise".

In State v. Downing, 22 Mo. App. 504, 508, the court had before it the above quoted portion of Section 13313 for interpretation. The court said:

"The next objection urged to the judgment of defendant is, that, as the license was issued to Gale, and defendant was his agent, peddling for him, Gale himself not using the license, the statute was not violated. I think the correct interpretation of section 6472, Revised Statutes, is that the license shall be issued to the person actually using it. That is, the individual peddling must have the license. I think the doctrine of principal and agent, invoked by defendant, does not apply to this statute. It says no two persons shall deal under the same license, whether they be 'partners, agents, or otherwise.' It is equivalent to saying, no person shall peddle under the guise of being a partner or agent of one who may have a license. The statute contemplates that the peddler himself will have his license at all times ready for exhibition to any sheriff, collector, constable, or citizen. Sect. 6479, Revised Statutes. It was not intended that his right to peddle should depend on his proof of agency for some one who might be licensed."

Under the authority of this case it is our conclusion that each employee of a baking company that is

peddling the wares of said bakery at retail is required to obtain a state peddler's license.

Your next question concerns the county peddler's license. Section 13318 R. S. Mo. 1929 fixes the amount to be paid for a state peddler's license and in the last sentence provides that "Any county court may by an order of record require all peddlers doing business in their county to pay a license tax not greater than that levied for state purpose."

While this statute does not expressly so provide, the county peddler's license is imposed on the same terms and conditions as is the state peddler's license. This is to be seen by reason of the fact that the county court is authorized to require all "peddlers" doing business in the county to pay the tax. The reference to "peddlers" relates back to the definition of peddler made in Section 13312 for state purposes and the limitation, above quoted, in Section 13313. That is to say a county peddler's license is imposed upon each person that actually does the peddling in the county.

Our opinion is that each person peddling the wares of the bakery at retail within a county may be required to obtain a county peddler's license, in addition to the state peddler's license, if the county court so orders.

For the purpose of avoiding any confusion, we wish to point out that one state license authorizes a peddler to sell his wares anywhere in the state and that he cannot be required to obtain the state license in each county.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

LLB:CP

MOTOR VEHICLES: Owner of body retains certificate of title when motor is sold.

February 7, 1940

2-9

FILED
33

Honorable John H. Glassco
Chief of Police
St. Louis, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "A question has arisen regarding the true status of reconditioned motors. When a motor has been removed from a motor vehicle does the certificate of title remain with the owner of the body or is it transferred to the buyer of the motor?
>
> "We realize that such a certificate of title might be rendered nugatory by such procedure since there is no longer any 'motor vehicle' in existence.
>
> "Will you please give us an opinion upon this question at your earliest convenience."

Section 7759, R. S. Missouri 1929, defines a motor vehicle as, "Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors."

Section 7774, R. S. Missouri 1929, provides that any owner of a motor vehicle or trailer may make application to the Commissioner of Motor Vehicles for a certificate of ownership giving certain information required by the statute. The Commissioner ascertains if the facts stated in the application are true and if satisfied that the applicant is the "lawful owner

of such motor vehicle" shall issue a certificate of ownership to the applicant. The statute further provides that:

> "* * * * * * * * * * * * * * * * * *
> The certificate shall contain a description, manufacturer's or other identifying number, and other evidences of identification of the motor vehicle or trailer, as the commissioner may deem necessary, together with a statement of any liens or encumbrances which the application may show to be thereon. The fee for each original certificate so issued shall be $1.00, in addition to the fee for registration of such motor vehicle or trailer. The certificate shall be good for the life of the motor vehicle or trailer, so long as the same is owned or held by the original holder of the certificate, and shall not have to be renewed annually. * * * * * * * * * * *
> In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the commissioner, * * * * * * * * *
> The buyer shall then present such certificate, assigned as aforesaid, to the commissioner, at the time of making application for the registration of such motor vehicle or trailer, whereupon a new certificate of ownership shall be issued to the buyer, the fee therefor being $1.00.
> * * * * * * * "

Laws of Missouri, 1935, page 299, Section 7781a,

provides in part as follows:

> "Nothing in this article shall be construed to prohibit the owner of a certificate of title to a motor vehicle issued by the Secretary of State of Missouri from removing the motor or engine from such motor vehicle and replacing same by a reconditioned motor or engine of the same make or manufacture, and giving such replaced motor or engine the same number as the removed motor or engine bore on having same installed.
>
> "Such owner shall joint with the person removing said motor or engine and replacing the motor or engine in said vehicle in an affidavit, which affidavit shall show the number of the engine or motor removed from said motor vehicle covered by said certificate of title, the date of such removal and the reason for such removal, and shall give a description of the motor or engine replaced in said motor vehicle, which replaced engine or motor shall bear the same number as the motor or engine removed, but shall be preceded by the symbol 'RC'. Said affidavit, together with the original certificate of title shall then be sent to the Secretary of State at Jefferson City, Missouri, with a fee of $1.00, for registration of such change in motors or engines. On receipt of same it shall be the duty of the Secretary of State to file the affidavit, and such certificate, in his office, and issue a new certificate of title covering said motor vehicle in the name of the owner thereof, as shown by the certificate filed, and to deliver said new certificate to such owner. * * "

It will be seen that the Legislature has only provided for a certificate of title to be issued for a motor vehicle. There is no provision in the law for a certificate of title for a vehicle only, or for a motor, but both must be present in order that the owner thereof may obtain or hold a certificate of title.

When the motor of an automobile is taken therefrom and sold, then said automobile is no longer a motor vehicle. Since the certificate of title under Section 7774, supra, attaches only to a motor vehicle, then we believe it is apparent that if the motor is sold that said certificate of title should not be delivered or passed with said motor.

This interpretation is not only compatible with Section 7774, supra, but is strengthened by the requirements of Section 7781, supra.

Under that section it will be seen that when the owner of a motor vehicle removes the motor therefrom and replaces it with another motor, then a new certificate of title must be taken out. In order to obtain this new certificate of title the original certificate of title must be sent to the Secretary of State. Therefore, unless the original certificate of title was retained by the owner of the body he would be unable to obtain a new certificate when a reconditioned motor is placed in the body. To hold that the certificate of title should be transferred to the buyer of the motor would lead to a situation which would be impractical if not absurd.

A statement of what would occur if the certificate followed the motor will perhaps show why the owner of the body should retain the certificate of title. "A", owner of a motor vehicle, sells the motor to "B" and assigns the certificate of title to "B"; "A" then purchases a reconditioned motor and installs it in his vehicle. "B" sells his motor and replaces it with the motor which he bought from "A". "A" and "B" wish to obtain new certificates of title required by the statute. In order for "A" to obtain a certificate he must send in his original certificate which is now in possession of "B" and the only certificate that "A" does have is

the one that he obtained with his reconditioned motor which is not the original certificate as required by the statute. "B", in order to obtain a new certificate, must send in the certificate which he acquired from "A" and which originally covers "A's" motor vehicle. Such a situation would lead to confusion and would abnegate the purpose sought to be accomplished by the reconditioned motor statute.

Under the reconditioned motor statute, Section 7781a, it was the intent of the legislature that when a motor was replaced by a reconditioned motor that the auto was to be considered as the same motor vehicle except with a new motor. This is shown by the fact that the same number that is on the original motor is placed upon the reconditioned motor with the symbol "RC" added. The identity of the car follows the body rather than the motor.

CONCLUSION.

It is, therefore, the opinion of this department that when a motor is sold by the owner of the motor vehicle that the certificate of title is retained by the owner and is not transferred to the purchaser of the motor.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO'K:DA

ELECTIONS: Voters may write in name of committeeman although declarations have been filed and candidates' names appear on ballot.

June 12, 1940

6-13

FILED
33

Honorable J. D. Gillespie
County Clerk
Oregon County
Alton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated June 10, 1940, which is as follows:

> "I will thank you very much if you will advise me on the following matter.
>
> IN THE MATTER OF FILING TOWNSHIP COMMITTEEMAN AND COMMITTEEWOMEN.
>
> 1. In the event no one files for Township Committeeman or Committeewoman, is it legal for the Chairman of the Central Committee to make up a list to be filed with the personal signature of the party to be filed.
>
> 2. In case someone files in any one township, and someone else's name is written on the ticket by the voters and receives a greater number of votes, is the party's name that was written in and received a greater number of votes allowed to qualify and declared elected as a Committeeman or Committeewoman?"

In answer to your first question, there is only one procedure prescribed by our statutes for filing as a candidate for township committeeman. The last sentence of Section 10278, R. S. Mo. 1929, is as follows:

" * * * Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257."

Section 10257, R. S. Mo. 1929, to which we are referred by the foregoing section, is as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

I, the undersigned, a resident and qualified elector of the (_____ precinct of the town of _____), or (the _____ precinct of the _____ ward of the city of _____), county of _____ and State of Missouri, do announce myself a candidate for the office of _____ on the _____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, _____, and I further declare that if nominated and elected to such office I will qualify.

(Signed) _____"

Any attempted filing of the declaration of a candidate is invalid unless in the form above prescribed by statute, or unless it contains all the elements of that form, so that a mere list, as suggested in your first question, filed by your county chairman, which does not substantially comply with Section 10257, is not a proper filing, and such candidate is not entitled to have his name printed on the ballot.

It is our conclusion, therefore, that to be entitled to have his name printed on the official ballot in the August primary, a candidate for committeeman must have substantially complied with the requirements of Section 10257, R. S. Mo. 1929, as to the form of his declaration.

As to your second question in regard to the election of one receiving a greater number of ballots by the "write-in" method, although another candidate had duly filed his declaration and been listed on the ballot, we refer you to Section 10278, R. S. Mo. 1929, which is as follows:

> "At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: * * * "

Plainly, the man and woman receiving the highest number of votes in any township are to be

declared elected as committeeman and committeewoman, respectively, regardless of whether his or her name is printed on the ballot, and regardless of the fact that the name of some other candidate may appear on the official ballot.

It is the conclusion of this office that the person receiving the greater number of votes for committeeman or committeewoman in any township is to be elected without regard to the name or names appearing on the ballot in its printed form.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

ADMINISTRATION: Public Administrator is agent of the Probate Judge. Personal property must be sold before real estate to pay debts and legacies. An estate escheating to the state is subject to inheritance tax return.

March 1, 1940

37

FILED
34

Mr. Clark H. Gore
Public Administrator
Atchison County
Rock Port, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 20th, 1940, which reads as follows:

"As Public Administrator of Atchison county, I have a problem in which I would like your counsel.

"I am in charge of the estate of George Potschke, a German who died here in January, 1939 at the age of eighty. I am not sure he was ever naturalized. He left no known heirs though he probably had distant relatives in Germany where he was born.

"The time for probating claims against his estate has expired and all claims are paid except the one in question now pending in the circuit court here. There is $2100.00 in cash, about $2000.00 in real estate contracts not yet due, and about $2000.00 worth of real estate left in the estate the remainder of which will escheat to the state, after the statutory period has elapsed.

"One, Herman Voltmer, a German with whom Potschke made his home a great deal of the time from 1919 to 1935, brought a suit for specific performance, claiming that the deceased promised to leave all of his property to him at his death. We contested this suit and the court found for us in a decree in which he held that the evidence clearly showed a cause of action for services rendered but not for specific performance.

"Voltmer has now filed an action for services rendered for about $8100.00. The costs in the first case taxed against plaintiff was nearly $200.00 and the costs in the present case will be more than that especially if plaintiff takes a change of venue as he threatens he will if the case is not disposed of without a jury trial.

"The case would undoubtedly go before Judge Bridgeman where my attorney and I believe plaintiff would recover at least half of what he is asking, and possibly more. Plaintiff has suggested that we waive a jury and let the court pass upon the evidence produced at the former trial to determine the amount due plaintiff. The court has indicated to me that if this is done he would find about $4000.00 due plaintiff. I know I could compromise it for that sum.

"I have sued the plaintiff for rents and money paid as surety, and will recover about $1100.00 which will be deducted from any amount he recovers from the estate.

"Because of the interest the state has in the outcome of this matter I would

like your advice on which course to take. If we stand trial by jury in a foreign county we will have to pay a great amount of costs and gamble on whether or not the judgment will be for more or less than it will be if we let the court here decide the amount due from the evidence of the former trial.

"Am I, as public administrator, incurring any personal liabilities by stipulating that the evidence of the former trial may be used in the present case to determine the outcome of the latter suit?

"Another question in my mind is: From what property would I pay a judgment of $4000.00? It would take all the cash, and the real estate contracts are payable monthly and will not be due for several years. If these contracts were put up for sale it might be difficult to find a buyer and the estate would undoubtedly take a loss on them. It would be best to sell the real estate, as it is in great demand and would bring the appraised value; but would I be permitted to sell it when I have other personal property (the real estate contracts) in the estate?

"As the remainder of this estate will escheat to the state, is it necessary to make an inheritance tax return? I would like to have your opinion on these matters within the next few days as this case is coming up in circuit court here next week.

Section 300 R. S. Missouri, 1929, referring to Section 299, in reference to the duty of public administrators taking charge of estates, reads as follows:

> "In addition to the provisions of this article, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions and proceedings as are enjoined upon or authorized against executors and administrators, guardians and curators by articles 1 to 13, inclusive, of this chapter, so far as the same may be applicable. He shall have power to administer oaths and affirmations in all matters relating or belonging to the exercise of his office.

Section 97 R. S. Missouri, 1929, reads as follows:

> "Executors and administrators shall prosecute and defend all actions commenced by or against the deceased, at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator."

An administrator or a public administrator is the agent of the probate court and not the agent of the parties interested in the probate proceedings. It was so held in the case of Rollins v. Shaner, 292 S. W. 419, par. 7, where the court said:

> "It is true, in a certain sense, that an administrator is the agent of the heirs and the legatees, but his agency

> is representative rather than personal. The appointment obtains, in some instances, irrespective of the wishes of the heirs. He is responsible to them for any act without his authority. But, acting within his authority and in accordance with law, he may legally perform acts against the express wishes of the heirs. His rights as administrator cannot be revoked without the consent of the courts. He holds in custodia legis the estate coming into his hands as administrator. Therefore, in the strict sense of the word, he is not the agent of the heirs, but is rather the agent of the probate court, whose order, generally speaking, he must obey."

In view of the fact that the public administrator is the agent of the probate court, it is suggested that the administrator under the above facts set out should use his discretion as to which he considers the best proposition for the settlement of the claim, and have the matter approved by the Probate Judge. In that way, he would relieve himself of any liability upon his bond. We would also suggest that the public administrator ask the approval of the Probate Judge for the use of the evidence of the former trial, and in that way the public administrator would release himself of any liability on his bond. All that the public administrator is bound by, is the rule to use due care in the settlement of the estate. It was so held in the case of Harms v. Pohlmann, et al, 297 S. W. 138, par. 5, where the court said:

> "As to executors and administrators, it has been held they stand in the situation of trustees for those interested in the estates they administer, and, in the management thereof, they are generally liable only for want of due care. Lewis v. Carson, 16 Mo. App. 342; Hill v. Evans, 114 Mo. App. 715,

> 722, 91 S. W. 1022; State ex rel. v. Dickson, 213 Mo. 66, 99, 111 S. W. 817. The case last named is directly in point and determines this issue against plaintiff's contention. The court held the sale of personal property by the administrator, upon the direction and request of adult distributees, or one who had authority to represent them, without an order of the probate court, bars them from recovery on the administrator's bond for any mismanagement of the estate. The administrator had the right to rely upon their approval of the sale, and to them it makes no difference whether he got an order of the probate court to sell or not."

The above authorities answer your first question which reads as follows:

> "Am I, as public administrator, incurring any personal liabilities by stipulating that the evidence of the former trial may be used in the present case to determine the outcome of the latter suit?"

Your second question requires an opinion from this department as to whether or not you can sell real estate to pay debts when there is personal property still in the estate.

Section 113 R. S. Missouri, 1929, reads as follows:

> "If the perishable goods be not sufficient to pay the debts, the executor or administrator shall, in the

> same manner, sell other personal estate until the debts and legacies be all paid; but specific legacies shall not be sold in any case, unless it become necessary for the payment of debts."

Under the above section perishable and personal property shall be sold for the payment of debts and legacies.

Section 142, Laws of 1939, page 176, reads as follows:

> "If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person: Provided, that where real estate is sold to pay debts or legacies, the proceeds from the sale thereof may be used when necessary to pay expenses of administration before being applied to the payment of debts and legacies."

Under the above section real estate cannot be sold where there is sufficient personal property to pay the debts and legacies. In selling real estate for the payment of debts, Sections 143, 144 and 145 should be strictly followed in the sale of real estate.

In view of the above sections, it is the opinion of this department that the real estate cannot be sold if there is sufficient personal property to pay the debts and legacies, and the personal property should be first sold before there can be a sale of real estate for

the payment of debts and legacies.

Your third question reads as follows:

> "As the remainder of this estate will escheat to the state, is it necessary to make an inheritance tax return? I would like to have your opinion on these matters within the next few days as this case is coming up in circuit court here next week."

In answer to the above, will say that in 1936 this office rendered an opinion that even where the estate will escheat to the state, it is necessary that it be assessed for inheritance tax return.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

CRIMINAL LAW :
MINES - MINING:

It is a misdemeanor to employ any child under the age of sixteen years to work in a mine or underground work.

January 17, 1940

FILED
35

Mr. Arnold Griffith
Chief Mine Inspector
Missouri Bureau of Mines
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 13, 1940, which reads as follows:

> "We would appreciate your interpretation on the two sections which deal with the age of children working in and about coal mines, namely sections 4277 and 13641.
>
> "Evidently there is a direct conflict in these two sections, which has caused considerable confusion in the minds of employers and also employees. Due to the fact that, as you will note, section 4277 sets the age of sixteen years for a child to be permitted to work in or about the coal mines; while section 13641 sets the age at fourteen if they can read and write and sixteen if they can't read or write."

Section 13641, R. S. Missouri, 1929, partially reads as follows:

> "* * * No male person under the age of fourteen years, or female of any age, shall be permitted to enter any mine to

> work therein; nor shall any boy under the age of sixteen years, unless he can read or write, be allowed to work in any mine. * * * "

Under the above partial section, it is provided that a boy under sixteen years of age cannot enter a mine to work therein, unless he can read or write. This section was known as Section 7484 R. S. Missouri, 1919, and was enacted and set out in the Session Laws of 1905, page 237. Section 4277 R. S. Missouri, 1929, partially reads as follows:

> "No child under the age of sixteen years shall be employed,* * * permitted or suffered to work at or be engaged in or about or in connection with any mine or underground work; * * * * "

This section prohibits the employment of any child under the age of sixteen years from working in a mine and it makes no difference whether he can read or write. It is very noticeable that this Section, 4277, is in direct conflict with Section 13641, supra, in that the age is placed at sixteen in Section 4277, supra, while Section 13641 allows a male person between the age of fourteen and sixteen to enter a mine if he can read or write.

Section 4277, supra, was passed and included in the Session Laws of 1919, page 250, also in the Session Laws of 1919 was a repealing law known as Section 1726P, which repealed all laws then in effect which were conflicting with the section that is now section 4277 R. S. Missouri, 1929, and known in the Laws of 1919 as Section 1726L.

In the case of State v. Brown, 105 S. W. (2d) 909, l.c. 911, pars. 4-6, the court said:

> "In construing statutes in pari materia, 'endeavor should be made, by tracing history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms, nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments.' 16 Cyc. 1147. We approved the above excerpt in State ex rel. Columbia National Bank v. Davis, 314 Mo. 373, 284 S. W. 464."

In the above case the court sought to harmonize two conflicting statutes which applied to the same subject matter but held that if a conflict existed they should be harmonized unless the subsequent statute repealed an earlier one in express terms.

Section 4277 which was originally enacted in the Session Laws of 1919, specifically repealed all laws then in conflict with that section.

CONCLUSION

Since Section 4277 R. S. Missouri, 1929, is a later statute by reason of being passed in 1919 and it also repealed all conflicting laws including the now known section 13641 R. S. Missouri, 1929, which section was enacted in 1905, Session Laws, page 237, it is the opinion of this department that Section 4277 is the governing statute.

It is further the opinion of this department that no child under the age of sixteen years can be employed in any mine or underground work even if he can read or write.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

ELEEMOSYNARY INSTITUTIONS: An idiot cannot be committed to the State Industrial Home For Girls.

February 7, 1940

2-10

FILED
35

Mrs. Kitty Shepherd Griesser
Superintendent
Industrial Home For Girls
Chillicothe, Missouri

Dear Mrs. Griesser:

We are in receipt of your request for an opinion, under date of February 2, 1940, which reads as follows:

"Pursuant to my conversation with you this evening, I beg to submit the following:

"On January 24, 1940 the Judge of the circuit court in which Montgomery County is located, sentenced a girl to this institution for a period of six months and then to be transferred to the institution for feeble-minded at Marshall. I am sorry to state that I can not remember the girl's name, Nellie Heying, as near as I can remember. At any rate, I refused to accept this girl on the ground that the law specifically states that a girl can not be comitted to this institution for less than one year. I felt this commitment was faulty and that I was with in my province to refuse her.

"I also informed the sheriff that day

that in the event the commitment was changed, that I would oppose it on the ground that this girl would come under the heading of idiocy in the strictest sense of the word.

"Today, February 2, 1940, the sheriff of Montgomery County, Mr. Covington, by name, again called at the institution with this girl, with a commitment that stated she was to be committed to this institution until she is 21 years of age. I again refused to accept this girl on the basis that she would come under the heading of idiocy and was not a fit subject for this institution, since the first commitment implied most definitely that she would come under the heading of feeble-mindedness.

"We do not have a psychiatrist on our staff and of course we did not make any sort of test on this girl, because this girl's first commitment definitely implied feeble-mindedness. Am I correct in assuming that the burden of proof is upon the court who sentenced this girl?

"Upon questioning this girl, it was very evident that she is feeble-minded and it is my opinion that she is not a subject for this institution, but a subject for a feeble-minded institution. Since this is a correctional and educational institution, it is my opinion she could not negotiate academic work and I felt that she would be an impediment to the rest of my population.

"This evening I called Judge Hollingsworth and tried to state my side of the case. He seemed to feel that I had dealt his court an affront. For this I am terribly sorry.

"In view of the above stated facts I feel that before I proceed in this case I should have your advice and I am requesting your opinion in this matter. I base my refusal on the Revised Statutes of Missouri, 1929, page 2363, section 8367, wherein I quote the following:

"'Certain girls may not be sentenced. -No court or magistrate shall sentence any neglected or dependent girl to said institution, or any girl who is insane or idiotic, or afflicted with an incurable disease or enciente, or who is so incorrigible that, in the opinion of the officer sentencing her, there is not a fair possibility of her reformation.'

"May I again bring to your attention the specific statement on the first commitment, which stated she was to remain in this institution six months and I was then charged to transfer her to the State School at Marshall for feeble-minded. This I consider the court's admission that she is a fit subject for the feeble-minded institution."

Section 8364 R. S. Missouri, 1929, reads as follows:

"All commitments to the industrial

> home for girls of girls, over the age of twelve and under the age of eighteen shall be made by the juvenile division of the circuit court. Every girl over the age of twelve years and under the age of twenty-one years, who shall be convicted of any offense not punishable with imprisonment for life, or whose associations are immoral or criminal, or bad and vicious, or who is incorrigible to such an extent that she can not be controlled by her parents or guardian in whose custody she may be, may be sentenced to said industrial home until she shall reach the age of twenty-one years, if the court or magistrate before whom such conviction shall be had deems the girl so convicted a fit subject to be committed to said home, and the age of the girl so committed to be indorsed on the commitment in case any such child is under twelve years of age the same to be placed under the control of the state board of charities and corrections, as provided by article 1, chapter 90, R. S. 1929."

The above section provides the manner and qualifications under which a girl may be admitted to the State Industrial Home for Girls. It will be noticed that under this section the girl can only be committed until she is twenty-one years of age.

Section 8367 R. S. Missouri, 1929, reads as follows:

> "No court or magistrate shall sentence any neglected or dependent girl to said institution, or any girl who is insane or idiotic, or afflicted with

> an incurable disease or enciente, or who is so incorrigible that, in the opinion of the officer sentencing her, there is not a fair possibility of her reformation."

Under this section the court is prohibited from sending a girl to the State Industrial Home for Girls if she is insane or an idiot. The question of insanity or whether she is an idiot is a question of fact which must be passed upon by proper procedure hereinafter set out. It is impossible for this department to say under your statement of facts, whether or not the girl in question is insane or an idiot to such an extent as to prohibit the court from committing her to the Industrial Home for Girls.

According to your request the question seems to be the determination as to whether the girl should be committed to the State Industrial Home for Girls or be committed to the State School for Feeble Minded, at Marshall, Missouri.

Section 8368, Laws of Missouri, 1939, page 579, reads as follows:

> "The officer in charge of the institution, by and with the written consent of the director of penal institutions, shall be authorized and empowered to return whence she came any girl who shall be found to be incorrigible or an improper subject for admission; and thereupon the court or magistrate by whom the said girl was committed, or his successor in office, shall have power to pass such sentence as would have been legal in the first instance if said girl had not been sent to said industrial home."

Under the above section, when a court commits a girl to the State Industrial Home for Girls, and if for any reason the home believes that the girl should not be committed under its custody, then the officer in charge of the institution may return the girl to the magistrate or court committing her to the institution, who shall in a way hold a rehearing on the committing of the girl and determine whether or not she has legally been committed to the Industrial Home for Girls. Upon the home complying with section 8368, it becomes a question of fact as to whether or not the girl should be committed to the Industrial Home for Girls or to the State School For Feeble Minded at Marshall.

Section 8696, Laws of 1931, page 218, reads as follows:

> "There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accommodated, shall be received into the school by the managers on such terms as shall be just; and shall be designated as private patients. Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, christian and surname, the town, city or county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part, and if in part only, stating what part; and stating also the de-

> gree of relationship or other circumstances of connection between the patients and the persons requesting their admission; which statement, in all cases of state patients, must be verified by the affidavit of the petitioners and of two disinterested persons, and accompanied by the opinion of two qualified physicians, all residents of the same county with the patient, and acquainted with the facts and circumstances stated, and who must be certified to be credible by the county court of that county, or, in the case of the city of St. Louis, by the hospital commissioner or the assistant hospital commissioner of said city; and such county court, or, in the case of the city of St. Louis, the comptroller of said city, must also certify, in each case, that such patient is an eligible and proper candidate for admission to the colony. State patients, whether of age or under age, may also be received into the colony upon the official application of any judge of a court of record: Provided, that the county in which such state patients as are now inmates of said school, resided when they were admitted, and the county wherein such state patients hereinafter admitted may reside at the time of such admission, shall be liable for and shall pay into the treasury of said school the sum of five dollars per month for each of such state patients."

The above section specifically sets out the manner in which a patient may be sent to the State School for Feeble Minded at Marshall, and should be followed specifically. According to your request we do not know

what procedure the court followed in committing the girl in question to your institution for six months and then to be committed to the State School for Feeble Minded; but unless she was examined, as set out in Section 8696, supra, she could not be committed by you or by the Governor to the State School for Feeble Minded, for the reason that the commitment to the Industrial Home for Girls can only commit her until she reaches the age of twenty-one years, while the commitment to the State School for Feeble Minded should read"until she is cured." It has been held that when a girl is committed to the State Home for Girls she cannot be re-committed to the State School for Feeble Minded upon any examination made by the physician or other people in authority at the State Home for Girls. It was so held in the case of Ex parte Griggs, 248 S. W. 609, l.c. 610, where the court said:

> "On March 27, 1917, the justice adjudged petitioner to be guilty as charged, and thereupon sentenced her to the state industrial home for girls at Chillicothe, Mo., 'until she reaches the age of 21 years'; she being found to be a fit subject to be committed to said institution. On February 15, 1923, the Governor of the state, upon the declaration of the physician of said industrial home that petitioner was feeble-minded, and proceeding to act under section 12302, R. S. 1919, issued his warrant, reciting the fact that petitioner had been sentenced to the industrial home and had been declared by the physician thereof to be feeble-minded, and directing the sheriff of Livingston county to convey to her to the colony for the feeble-minded and epileptic at Marshall, Mo., 'there to be detained until restored to reason.' In accordance therewith, pe-

titioner was taken to the institution at Marshall, and has been confined there ever since. To test the legality of her confinement there, and to obtain her liberty and release therefrom, this application for a writ of habeas corpus is made. The writ was issued, and the superintendent of the colony for feeble-minded and epileptic has brought petitioner before us, stating in his return the facts and basis of her detention as hereinabove stated. * * * * *
* * * * * * * * * * * * *

"Section 12302, R. S. 1919, under which the Governor's warrant was issued, cannot, in our view, be made applicable to a case of this kind. It provides that 'if any person, after being convicted of any crime or misdemeanor,' shall become insane before the execution of the sentence imposed, the Governor may inquire into the facts and pardon such lunatic, or commute or suspend, for the time being, the execution of the sentence for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the penitentiary, 'order such lunatic to be conveyed to a state hospital and there kept until restored to reason.' The section is in article 7, chapter 111, relating to state hospitals for the insane, and has no reference to the colony for the feeble-minded and epileptic provided for in article 13 of said chapter. The institution at Marshall is not a state hospital, and the only way in which persons are admitted thereto is contained or provided for in section 12391, R. S. 1919. It

> follows, therefore, that the restraint and control over petitioner by the respondent, as superintendent of the colony for feeble-minded, is without authority of law, and she should be discharged therefrom. However, petitioner is still under sentence of commitment to the industrial home for girls at Chillicothe, Mo., until she is 21 years of age, and that institution is lawfully entitled to her custody. * * * * * * "

CONCLUSION

In view of the above authorities, it is the opinion of this department that under the facts set out in your request, if the officials at the Industrial Home for Girls believe that the girl committed to the Industrial Home for Girls is an idiot, then, under Section 8368, Laws of 1939, page 579, the home may return the girl to the court in which she was committed to the Industrial Home for Girls, and a procedure should be gone through with which is in the nature of a rehearing on whether or not the girl is an idiot. This is a question of fact which must be determined by the Judge committing her to the Industrial Home for Girls. After the girl has been returned to the county from which she was committed to the Industrial Home for Girls, the procedure as set out in Section 8696, Laws of Missouri, 1931, page 218, should be followed, in that some one should request the girl's admission to the State School for Feeble Minded, by an affidavit of the petitioners and two disinterested persons accompanied by the opinion of two qualified physicians, all residents of the same county with the patient who should certify that the patient is feeble minded or is an idiot, and is eligible and a proper candidate for admission to the State School

for Feeble Minded.

It is further the opinion of this department that if the girl described in your request is an idiot no court can sentence her to the State Industrial Home for Girls.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

TAXATION AND REVENUE: Trustee appointed by County Court, under Section 9953b, purchasing lands for the tax funds, does not include trustees for private individuals. Sale by such trustee eliminates the city tax lien of City of Chillicothe for particular years involved.

February 15, 1940.

FILED
35

Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

We desire to acknowledge your request for an opinion on February 13, 1940, which is as follows:

> "I desire an opinion from your office concerning the effect of a delinquent tax sale under Section 9953a and 9953b, Session Acts, 1939, page 850.
>
> "The County Court of this county has regularly sold certain real estate under the above sections for delinquent taxes while at the same time there were delinquent taxes against the same property due the City of Chillicothe. Does the purchaser of such real estate, whether he be a trustee for the County Court or a private individual take this property free from the liens of the City of Chillicothe taxes?
>
> "Also, should the City of Chillicothe sell real estate under a delinquent tax lien, must the County protect its claim for taxes or does the lien for state and county taxes still hold? Thanking you for the courtesy of a prompt reply, I remain."

I.

Section 9953a, Laws of Missouri 1939, at page 851, is, in part, as follows:

> " * * * No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. * * * "

Section 9953b, Laws of Missouri 1939, at page 851 is, in part, as follows:

> "It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of

> Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * "
> (Underscoring ours)

Trustees appointed by the county court and the City of St. Louis, under the provisions of Section 9953b, supra, may bid on lands sold under the provisions of Section 9953a, supra, which provides for a final sale. The trustees bid in the land for the general county and state tax funds and sell the same upon order of county court. The proceeds of the sale by such trustee, after payment of costs incurred and advanced, are distributed pro rata to the funds.

General taxes constitute a paramount lien and a final sale, thereof, constitutes a foreclosure of Junior liens for the particular years involved. Trustees of deeds of trust and other private contracts, wherein a trustee is named or where by operation of law, trustees must be named by the court, are not within the purview of the above statutes.

The question of the priority of general tax liens was raised in the case of Meriwether vs. Overly, 228 Mo. 218, 250 and, in construing the status of a lien for general taxes on real estate, the court said:

> "A tax against real estate is a tax against the property, and not against the owner. If the taxes have been legally assessed, they become a lien on the property prior to all other liens."

In Little River vs. Sheppard, 75 S. W. (2nd) 1013, 1014, the same principle was restated by the court, en banc, in the following language:

> "The lien for state and county taxes shall be paramount."

CONCLUSION

Therefore, it is the opinion of this department that a trustee appointed under the provisions of Section 9953b, supra, may purchase lands at a general tax sale, as trustee for the funds for which the sale was had, and that there may be no appointment of such trustee for a private individual under said statute. That a sale by the trustee appointed by the court, under order of court, conveys the title obtained by him under Section 9953a, supra, free from the tax liens of the City of Chillicothe for the particular years involved.

II.

ALSO, SHOULD THE CITY OF CHILLICOTHE SELL REAL ESTATE UNDER A DELINQUENT TAX LIEN, MUST THE COUNTY PROTECT ITS CLAIM FOR TAXES OR DOES THE LIEN FOR STATE AND COUNTY TAXES STILL HOLD? THANKING YOU FOR THE COURTESY OF A PROMPT REPLY, I REMAIN.

This question is answered in an opinion rendered by this department to Mr. Charles E. Murrell, Prosecuting Attorney of Adair County on September 26, 1939, a copy of which is enclosed herein.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB
Encl.

DRAINAGE DISTRICT : There is no provision by statute for
BY THE COUNTY COURT: the dissolution of a drainage district organized by the county court under Article 2, Chapter 64 R. S. Mo. 1929, and it may not be dissolved except by statute.

April 12, 1940

FILED
35

Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

We desire to acknowledge your request for an opinion on March 26, 1940 wherein you state that the drainage district was incorporated by the county court and is now under Article 2, Chapter 64 R. S. Mo. 1929, said request being as follows:

> "In 1909 a petition was filed in the County Court of this County for the incorporation of a drainage district under what is now Article 2, Chapter 64, R. S. 1929. Such proceedings were had as that in 1910 the district was incorporated, bonds issued to pay for the construction of the ditch, the ditch was constructed, assessments of benefits and damages made as required by law.
>
> "The bonds have been entirely paid, and the district is not functioning, the drainage ditch having been completed, and nothing has appeared in the County Court to require any action with respect to the district for about ten years.
>
> "After the district ceased to function the County Court, out of the public funds of the County, built at least one bridge across the drainage ditch, which bridge it subsequently maintained until the passage of an act several years after the bridge was built apparently prohibiting

> the County Court from spending public funds on bridges located across drainage ditch.
>
> "I think everybody connected with the matter feels that the district ought to be disincorporated. The land owners are insistent that an order be made by the County Court disincorporating the district, and I want to advise the County Court with respect to the matter, but I am not entirely clear as to their powers in the matter, and I would be gratified to have you advise me your views with respect to the situation."

Drainage districts organized by a county court under the provision of Article 2, Chapter 64, supra are organized "when it shall be conducive to the public health, convenience or public welfare, or when it will be a public utility or benefit".

This chapter was amended in part by house bill #590, Laws of Mo. 1939 at page 365, section 10843 thereof being as follows:

> "It shall be the duty of the several County Courts of this state to maintain the efficiency of the drainage districts now or hereafter organized and existing under and by virtue of the provisions of this article and such courts are vested with the continuous management and control of said districts with the duty and power of maintaining, preserving, restoring, repairing, strengthening and replacing the drains, ditches and levees thereof. For the purpose of maintaining said ditches, drains and levees, all of the drainage districts in a county on a petition filed by a majority of the land owners owning the majority of the acres of land in each district of such county, may be treated and administered as a unit for such purpose in conformity with all the provisions of Section 10842 to 10847 inclusive."

The above bill further provided for a maintenance tax in order that the purposes of the organization of the district might be carried out. In 19 C. J. 624 we find the following language:

> "The legislature may, with due regard to vested rights, abolish drainage districts. Morgan Engineering Co. v. Cache River Drain. Dist., 115 Ark. 437, 172 S. W. 1020; Peo. v. Sacramento Drain. Dist., 155 Cal. 373, 103 P 207; Peo. v. Reclamation Dist. No. 551, 117 Cal. 114, 48 P 1016; Bissell v. Edwards River Drain. Dist. 259 Ill. 594, 102 NE 990."

In the case of State ex rel vs. Mo. State Life Insurance Co., 228 Mo. App. p. 46 the court says:

> " ** The law provides no method for the dissolution of drainage districts organized under the county court law. No such power is vested in the county court. The sole power to dissolve such a district once formed would seem to lie with the Legislature. (19 C. J. 624.) * * * * * The Legislature, by failing to provide a method of dissolution, as it did so provide under the chapter relating to Circuit Court Levy Districts (see Sec. 10957, R. S. 1929), must have intended to leave the corporation in existence for the purpose of permitting it to continue as a corporate body and liquidate its outstanding obligations. Such a district has no governing head or supervisors, but all the authority in connection therewith is vested in the county court. In order to pay the outstanding obligations of the district proper action on the part of the county court was therefore necessary. This action the county court took by its order made in August, 1930. The matter of assessing the amount necessary to pay the expense of organizing the district had never before been adjudicated and we think the county court had authority to make such an order under the statutes, notwithstanding the fact that the order was made three years after the incorporation of the district and after its order of March, 1930, dismissing the proceedings."

In the case of Hambleton v. Town of Dexter, 89 Mo. 188, 192, the court stated:

> " * * * * These towns, when they are once incorporated, can only become disincorporated by resorting to the proceeding pointed out by the statute. 2 S. W., 1319 and 1320. * * *"

CONCLUSION

Therefore, in view of the fact that the above drainage district, a municipal corporation, was organized for the health, convenience, public welfare and as a public utility or benefit and the legislature vested the county court with the continuous management and control of said district and with the duty and power of maintaining, preserving, restoring, preparing, strengthening and replacing drains, ditches and levees thereof and provided no plan for dissolution of said drainage district, it seems that the legislature clearly had no intention that such district should be dissolved even though the bonds had been paid in full which were issued for construction of said improvement.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

LOTTERIES: Card "Win the Bank" on which lines are drawn through numbers, and persons having highest total receiving a prize is a lottery under Sections 4314 and 4315 R. S. Mo. 1929.

April 25, 1940

1/29

FILED
35

Honorable Waller W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

The writer is in receipt of your request for an opinion based on the following facts as contained in your letter:

> "I hereby respectfully request an opinion of the Attorney General's office in regard to the interpretation of Sections 4314 and 4315, R. S. Mo. 1929, and Article 14, Section 10, of the Constitution, in relation to the enclosed pamphlet.
>
> "This pamphlet or entry blank offers a prize to the person obtaining the highest total figures from a selection of the sixty numbers set out on said blank. According to the rules of this contest, as described in said entry blank, apparently two of the essential elements of a lottery are present, to-wit: a prize, and a consideration, inasmuch as the winner, in order to obtain one of these entry blanks, must have purchased a ticket, and

> likewise must be present at the time the prize is awarded. However, the third element of a lottery, that is, the element of chance, is not apparent, inasmuch as the judges have no discretion in the awarding of the prize, the decision resting on a mathematical calculation.
>
> "I would greatly appreciate your interpretation of the above mentioned sections of the Statutes and the Constitution, as applied to this particular plan or scheme, which is described on the enclosed form, and whether or not, in the opinion of the Attorney General's office, this plan is in violation of the law and in contravention of the sections hereinabove referred to."

From an examination of the blank designated as "Win the Bank," we believe that this contest is conducted by theaters and moving picture shows. The card, and its manner of operation, appears to be innocent within itself. We must assume at the outset that the author of "Win the Bank" was thoroughly familar with the operation of what was commonly called "Bank Night," which received the death knell in the decision of State v. McEwan, 120 S. W.(2d) 1098. Ever since that decision there have been numerous schemes submitted to this Department in an effort to evade one of the elements of a lottery, to-wit, chance, prize, and consideration. Some have been so astute in their operation as to be classified as successful evasion.

The official entry blank for "Win the Bank" does not state what the price will be. However, there is one significant paragraph under the "Official Rules and Regulations" which we are quoting as follows:

> "In case of a tie, then the prize will be divided equally between the tying contestants who are present in the theatre at the time the award is to be made. Those persons with the highest correct total who are not present at the time the Prize is to be awarded, automatically forfeit all rights and interest in the prize. If the contestant with the highest total is not present and there are no ties or, if there are ties, and none of the contestants with the highest total are present, the prize will be added to the prize offered for the following week and awarded on the highest total for the particular Numbers Bank designated for the following week."

The above paragraph, in effect, is very similar to the method used in "bank night." You state in your letter that the element of chance is the controversial point in the scheme. The Supreme Court in the case of State v. Globe-Democrat Publishing Co., 110 S. W. (2d) 705, reviews all of the cases with reference to lottery in the United States and Canada, and we shall not burden this opinion with the quotations from the various cases, but those interested would do well to read the long and exhaustive opinion by Judge Ellison. We quote Judge Ellison's conclusion with reference to the various cases (l. c. 717):

> "It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part

> of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

And again (l. c. 717 and 718):

> "But such is not the true general rule. As was said in People ex rel. Ellison v. Lavin, supra, if a contest were solely between experts, possibly elements affecting the result which no one could foresee might be held dependent upon judgment; but not so when the contest is unrestricted. What is a matter of chance for one man may not be for another. And as Mr. Justice Holmes said in Dillingham v. McLaughlin, 264 U. S. 370, 373, 44 S. Ct. 362, 363, 68 L. Ed. 742, 'what a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.' Obviously, if some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or

> education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it."

We think the above quotation means, in effect, that the rule that chance must be a dominant factor in determining whether a contest is a lottery, is to be taken in a qualitative or causative sense rather than in a quantitative sense.

It is difficult for this Department to pass conclusively on the question which you present for the reason that we are not familiar with the practical operation of "Win the Bank." But we remind you that the Globe-Democrat decision and the decision in the case of State v. McEwan, supra, show a decisive tendency on the part of the Supreme Court to view any scheme "with a scrutinous eye," for the public good, and that every scheme appears to be an effort "to fool the law." As an example of this we quote from Commissioner Westhues' decision in the McEwan case, supra, l. c. 1100:

> "Isaac was blind, and there is an old adage that justice is blind. But justice is only blind in so far as it does not make any distinction between litigants, be they of high or low degree, rich or poor, Jew or Gentile. Justice cannot distinguish one from the other. However, in detecting fraud and deception justice should have the vision to discover them in their true nature no matter

how well the design to deceive. The courts would be blind indeed if they could not see that the scheme described in the indictment is a deliberate plan to evade the lottery statute and at the same time attain the result which the statute has prohibited. The history of these cases conclusively shows that the entire scheme is a deliberate plan to evade the lottery statute. Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater. Respondent concedes that to be the law. The plan, as described in the information, attempts to eliminate one of the elements of lottery, that of consideration. In the practical operation of the scheme the element has not been eliminated because it is not in fact free. The Supreme Court of Texas, in the case of City of Wink v. Griffith Amusement Co., 100 S. W. 2d 695, loc. cit. 699 (9 -11), correctly analyzed the situation. The court there pointed out that those remaining on the outside did not share equally with those who paid an admission. Those who paid admission witnessed the drawing and heard first hand the announcement of the winning number. Those upon the outside did not. The court concluded: 'This admission charge is inseparable from the privileges enumerated, which were materially different from the privileges of those who remained outside of the theater holding

the so-called "free" registration numbers. It is idle to say that the payment made for seeing the picture is not, in part at least, a charge for the drawing and the chance given. The things to be seen and done in the theater and the privileges above enumerated which accompanied them, are all a part of one and the same show, meaning the entire proceedings inside the theater. The fact that part of the things to be enjoyed by those who paid at the door were classed as "free" by the defendant in error does not change the legal effect of the transaction, or what was actually done by defendant in error, namely, for the price of admission to grant the patron not only the opportunity to see and hear the picture, but to see and hear and enjoy the habiliments of the "Bank Night," drawing, etc., detailed above. We are unable to see in what manner the giving of free registration numbers to those outside of the theater would change the legal effect of what was done inside the theater, for which a charge was made.'

"Upon this point see, also, the case of Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N. E. 2d 648, loc. cit. 653 (3). In the plan described in the information any person desiring to participate therein must be in attendance at the theater, either inside or outside. One cannot sit by his fireside and take part therein. He must be present and swell the crowd

> at the theater. Such persons naturally get enthused and the gambling spirit, ever present in the human breast, is quickened. The very evil at which the law is aimed. The stake rises from week to week--$25, then $50, $100, perhaps to $150 or more. Soon the theater is filled with persons on bank night, each hoping that he may be the lucky person. The picture becomes of little importance. The participants in the lottery care little whether the picture is one portraying a masterpiece of Shakespeare or a light modern novel. The so-called free number feature of the scheme is only the goat's skin upon the hands of Jacob. It is there in an attempt to fool the law."

And again (l. c. 1102):

> "A number of the cases which have held the scheme legal are: Affiliated Enterprises v. Gruber (C.C.A.) 86 F. 2d 958; State v. Hundling, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 861; Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38; State v. Crescent Amusement Co., 170 Tenn. 351, 95 S. W. 2d 310; State v. Eames, 87 N. H. 477, 183 A. 590. We cannot follow the reasoning as outlined in those authorities because we feel that in doing so we would be joining hands with those who designedly devise ways and means to evade our lottery laws and thereby defeat the very purpose of our Constitution and the law enacted in obedience thereto. Such a policy can only tend to force the legislators to constantly enact new laws to meet the ever increasing cunning devices to evade the existing laws."

In view of the late decisions by our Supreme Court we are of the opinion that "Win the Bank," both in its theoretical and practical effect, is a lottery under Sections 4314 and 4315, R. S. Mo. 1929, and Article XIV, Section 10 of the Missouri Constitution, and accordingly so hold.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

OFFICERS -

COUNTY TREASURERS: Right to refuse payment of warrant until contest of election suit has been determined.

May 10, 1940

5/27

FILED
35

Hon. Joseph L. Gutting
Prosecuting Attorney
Clark County
Hiller Building
Kahoka, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated May 2, 1940, which is as follows:

> "I would like an opinion upon the following set of facts, to wit:
>
> "At the general election in 1938 'A' received more votes by the tabulated count than 'B' for the office of Circuit Clerk of this County and received his certificate of election and took the office and ever since and now is operating said office. In proper time 'B' filed a contest and on April 29th 1940 the Circuit Court rendered a judgment that 'B' received more legal votes than 'A' and ordered that 'B' was legally entitled to the office. From this decision 'A' is taking an appeal.
>
> "Our County Court duly issued a warrant to 'A' for his salary for the month of April 1940 (This was done May 1, 1940) and 'A' presented said salary warrant to The County Treasurer for payment, who does not know

whether or not to pay said warrant as 'B' gave The County Court the following notice on April 30th 1940:

'NOTICE

To the County Court of Clark County, Missouri, and to each of the judges thereof, individually:

You are hereby notified that The Hannibal Court of Common Pleas by its judgment rendered April 29, 1940, and made a record of said Court, did decree that at the general election in Clark County on November 8, 1938, I was duly elected to the office of Circuit Clerk & Ex-Officio Recorder of Deeds of Clark County, and that the office now belongs to me and that Sam B. Fish shall forthwith vacate and turn said office over to me.

You are further notified that I shall hold you responsible for the salary of said office from the date of said judgment and also from January 1, 1939.

(signed) B '

"The County Court has been paying 'A' his salary since he took office January 1, 1939.

"QUESTION: Should the County Treasurer pay said salary warrant or not and

> if so should any such warrants be paid in the future to 'A' during said appeal; and before final determination?"

From the above statement of facts we conclude that you have in mind a case which involved Section 10340 R. S. Missouri, 1929, which provides as follows:

> "In every case of a pending contested election, the person holding the certificate of election may give bond, qualify and take the office at the time specified by law, and exercise the duties thereof until the contest shall be decided; and if the contest be decided against him, the court or other tribunal deciding the same shall make an order for him to give up the office to the successful party in the contest, and deliver to him all books, records, papers, property and effects pertaining to the office, and may enforce such order by attachment or other proper legal process."

For the purpose of a more clear understanding of the nature of this kind of case we cite State ex rel v. Woodson, 128 Mo. 497, 31 SW 105; Ex parte Craig, 130 Mo. 590, 32 SW 1121. The court held the appeal bond required to be given by what is now known as Section 10382 R. S. Mo. 1929, providing for appeals from judgments in election contests, does not operate as a supersedeas as to anything appealed from except the costs. See also State ex rel v. Hennings, 194 Mo. App. 545, loc. 549.

In conclusion, we are constrained to hold, in view of the fact that an appeal in an election contest case does not act as a supersedeas as to anything except the costs, that A has been ousted and that B is now the circuit court clerk under the judgment of the circuit court.

Therefore, it is apparent that the treasurer of the county should not honor the warrant in question, or any warrant in the future that is payable to A.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

BRC:RW

LIQUOR CONTROL: Act does not prohibit sale of liquor in original package over telephone even though seller delivers and collects off the licensed premises.

September 13, 1940

Honorable W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

FILED
35

Dear Sir:

This will acknowledge receipt of your letter of August 15, 1940, which is as follows:

"In order that this office may effectually aid in the matter of enforcement of the 'Liquor Control Act', it is necessary to make this request for an opinion from your office on a matter in which conflicting contentions have been advanced.

"Section 5 of the 'Liquor Control Act' (Laws of 1933, Ex. Sess., page 88) prohibits the sale of intoxicating liquor 'in any other place than that designated in the license.'

"The problem of interpretation arises in connection with sales received over the telephone at the premises of the holder of an original package license and delivery made on such sale in conformity with the order received.

"The following contentions are advanced: one that sales made over the

> telephone with subsequent delivery and payment elsewhere are in violation of law, which provides that persons cannot sell intoxicating liquor in any other place than that designated in the license, and it is contended that the delivery is a part of the sale and that the sale is not at the premises described in the license and therefore unlawful.
>
> "On the other hand it is contended that when an order for liquor is received over the telephone and the order therein accepted and there is nothing left to be done except to deliver the goods and collect the money, that then the sale is completed at the time that the order is received and accepted, and delivery and payment is not a part of the sale and therefore not violative of the law since it is not to be considered a sale of liquor off the premises described in the liquor license."

State v. Rosenberger, 212 Mo. 648, was a case under the old Local Option Law. The facts in this case were that the defendant resided in Jackson County, Missouri, and conducted a liquor business there. A resident of Webster County, which had voted for Local Option, ordered a gallon of whiskey from defendant. The whiskey was sent by common carrier (Wells-Fargo Express Company) by defendant to Webster County, Missouri, C.O.D. The person who ordered the whiskey received it from the carrier, paid the price of the whiskey plus the delivery charges to carrier, who, in turn, remitted the purchase price to the defendant.

The defendant was charged with making a sale of whiskey in Local Option territory and was convicted in the trial court. This conviction was reversed and the defendant was discharged on appeal. The Supreme Court held in this

opinion that under these circumstances, the sale took place in Jackson County.

Upon the question of where the sale took place, the court said at l.c. 654:

> "As a general rule the delivery of goods by the vendor to the carrier, when the goods are to be sent that way, is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu. (2 Kent's Com., 490; State v. Wingfield, 115 Mo. 428; Kerwin & Co. v. Doran, 29 Mo. App. 397; Garbracht v. Commonwealth, 96 Pa. St. 449; Dunn v. State, 8 S.E. 806.) And this is true although the purchase money is afterwards collected by the vendor or agent at the place from which the goods are shipped. (State v. Hughes, 22 W. Va. 743).
>
> "But when the goods are shipped upon order C.O.D., as in the case at bar, there is much conflict in the authorities as to where and when the title passes, that is, whether at the point of shipment or at the point of destination, upon payment of the purchase price. In American Express Co. v. Iowa, 196 U.S. l.c. 143, it is said: 'True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C.O.D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others, deciding that the merchandise is at the risk of the seller, and that the sale is not completed

until the payment of the price and delivery to the consignee at the point of destination.'

"Among the authorities which hold that a sale C.O.D. is not complete until delivery, acceptance, and payment of the purchase price by the person ordering the goods, may be cited: United States v. Shriver, 23 Fed. 134; United States v. Cline 26 Fed. 515; State v. United States Express Co., 70 Iowa 271; State v. Wingfield, 115 Mo. 428; State v. O'Neil, 58 Vt. 140; State v. Goss, 9 Atl. 829; United States v. Chevallier, 107 Fed. 434; Baker v. Bourcicault, 1 Daly (N.Y.) 23; Crabb v. State (Ga.), 15 S.E. 455; Dunn v. State, 82 Ga. 27; State v. Intoxicating Liquor (Vt.), 2 Atl. 586; Wagner v. Hallack, 3 Colo. 176; O'Neil v. Vermont, 144 U.S. 323; Town of Canton v. McDaniel, 188 Mo. 207. But in 17 Am. and Eng. Ency. of Law (2 Ed.), 301, it is said: 'At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C.O.D., the sale is completed when the liquor is delivered to the carrier;' citing Pilgreen v. State, 71 Ala. 368; Hunter v. State, 55 Ark. 357; Berger v. State, 50 Ark. 20; Bunch v. Potts, 57 Ark. 257; Com. v. Russell, 11 Ky. L. Rep. 576; Com. v. Kearns, 15 Ky. L. Rep. 332; Current v. Com., 11 Ky. L. Rep. 764; James v. Com., 42 S.W. 1107; State v. intoxicating Liquor, 73 Me. 278; Com. v. Fleming, 130 Pa. St. 138; State v. Flanagan, 38 W. Va. 53; State v. Hughes, 22 W. Va. 743. The same doctrine is announced by the courts of Texas and other States.

"In Com. v. Fleming, supra, it is decided that the term 'C.O.D.' placed upon an express package, means that the carrier is thereby directed to collect the price of the goods at the time of delivering them to the consignee, and to withhold such delivery until payment is made, and is authorized, upon receipt of such payment, to discharge the purchaser of the goods from liability for their price; that 'when, in pursuance of an order for goods, directed by the purchaser to be shipped to him C.O.D., the vendor has delivered them to a common carrier, with instructions to collect their prices from the consignee before delivering them to him, the transaction as a sale is complete so far as the vendor is concerned. In such case, while the title to the goods does not pass to the purchaser if they be not delivered to him by the carrier, that circumstance does not affect the character of the transaction as a completed contract of sale; the seller's right to recover the price, if the purchaser refuses to take the goods, is as complete as if he had taken them without payment.' In that case the facts were that a liquor dealer in a certain county of Pennsylvania received an order for liquor to be shipped to the purchaser in another county of said State, C.O.D., and in pursuance of the order the dealer delivered the liquor to a common carrier in the county where the dealer resided for shipment to the vendee, at the latter's expense, C.O.D. It was held that the delivery to the carrier was a delivery to the purchaser in such a sense as to complete the sale in the county from which the shipment was made. The same doctrine is announced and upheld by a long line of decisions of the courts of Texas; also in State v. Flanagan,

> 38 W. Va. 53; American Express Co. v. Iowa, 196 U.S. 133, and Adams Express Co. v. Kentucky, 206 U.S. 138."

And in this case, the court overruled two previous cases holding to the contrary which we have underlined in the above quotation.

State v. Swift & Company, 273 Mo. 462, was a case in which the defendant was charged with offering for sale and keeping on hand 150 pounds of colored oleomargarine in St. Louis, Missouri. The statute under which defendant was prosecuted was leveled at the sale of oleomargarine colored so as to resemble butter. The facts in this case were that the defendant received an order from the Stocker Brothers' Grocery Company in St. Louis, Missouri, for the 150 pounds of oleomargarine. The defendant's plant was located in Illinois. The oleomargarine was separated by defendant from his general stock, loaded into a wagon belonging to himself and delivered to the Stocker Brothers' Grocery Company in St. Louis, Missouri. The cost of the oleomargarine was charged to the Stocker Brothers' Grocery Company and was later paid. The court held in this case that the sale took place at defendant's plant in Illinois. Upon this question, the court said at l.c. 467:

> "The rule in this State in sales of this character is that where anything remains to be done between the parties before the property is delivered, as separating the specific quantity from a larger amount, or identifying it, the sale is not complete; but after the separation for the purpose of delivery, when there is nothing further to be done except to deliver the goods, the sale is complete and the title passes. (Bank v. Smith, 107 Mo. Ap. l.c. 190; Longsdorff v. Meyers, 171 Mo. App. 255.) The only

thing that was lacking in this case was the separation of the goods from the general stock. After they were separated and segregated by placing them in the wagon for the purpose of delivery it would look as if the contract of sale was complete at that time, and title passed, as would have been the case if Swift & Company had had only five cases of oleomargarine and Stocker Brothers had been in the store at the time, designated the five cases, and agreed upon the terms of purchase.

"It seems to make no difference that the goods were not paid for at the time, but charged to the purchaser's account. It is held usually that where a contract of sale is made for a specific article to be charged for and where there is nothing more to do except deliver it and collect the price, the contract of sale is complete without delivery and without payment. (Commonwealth v. Hess, 17 L.R.A. (Pa.) 176. State v. Davis, 60 S.E. (W. Va.) 584.) In the Hess case the seller conducted a wholesale liquor business at a place where it was lawful to do so, but delivered the liquor in question to the purchaser in territories where it was unlawful, and it was held that the sale was complete at the seller's place of business where the goods were separated from the general stock and the price charged to the purchaser."

In support of this statement, the court cited State v. Davis, 60 S. E. 584 (W. Va.). This case is a liquor case somewhat similar to the Rosenberger case. The facts as stated in the opinion, were as follows:

"'Charles Davis, the defendant, is a resident of the city of Huntington, county of Cabell, and state of West Virginia. He is engaged in the business of selling spirituous liquors, etc., and is duly licensed to sell the same at No. 755 Second Avenue, in said city. And, for a more particular description, his place of business where he keeps and maintains a saloon is the southwest corner made by the intersection of Second Avenue and Wight Street in said city of Huntington; that on the _____ day of October, 1905, and within one year prior to the finding of the said indictment, one Emma McDonald, residing with one Bettie Mead, at No. ____ on Second avenue, in said city, and distant about one square from the said defendant's saloon, gave an order from the house where she resided, over the telephone, to the defendant at his place of business, to forward to her at her place of residence a certain quantity of beer, and that she would, when the beer was delivered to her, pay the price for the same; that, pursuant to said order so made, the defendant had forwarded to her the beer by his porter, and that when the porter delivered it to her she paid him for it. She stated that she had a number of times ordered beer in this way; that same had been sent to her by the defendant, and that when delivered she would pay for it, and she always knew the price of the beer; that one time, or perhaps oftener, she had, when phoning to the defendant for beer, stated to him that she did not have the necessary change, but that she had money of such and such denomination, and that if defendant would send with the beer the requisite change, that, in that manner, she could and would pay for the beer; that

> at such time or times the defendant had sent the necessary change as requested, and that in that way she had paid for the beer.'"

In West Virginia the statute under which defendant was prosecuted was one which prohibited a liquor dealer from selling liquors at any place other than that designated in the license, which is substantially the same as Sections 5 and 20 of the Missouri Liquor Control Act. (Laws 1933-34, p. 80; Laws 1939 p. 822). In this case, the court held under these facts that the sale took place on the premises described in the license. This case seems to be directly in point and has been approved by the courts of this state.

Under the above cases, it would seem that when a person orders intoxicating liquor from a liquor dealer to be delivered to him at his home or to any other place, that the sale takes place and is completed on the premises of the liquor licensee, even though the delivery is made by an employee of the licensee and the purchase price is not actually paid until the liquor is delivered to the purchaser.

What is said here only applies to original package licensees or when the sale is by the original package not to be consumed on the premises.

The statute authorizing sale by drink of intoxicating liquor contemplates that the liquor is to be consumed on the premises where sold. This is to be seen by Section 22, Laws 1935, page 275, where it is provided:

> "* * *For every license issued for the sale of all kinds of intoxicating liquor, as herein defined, at retail by the drink for consumption on the premises of the licensee. * * *"

It would seem that a licensee who holds a retail by the drink license, and delivers same by order off his premises in glasses, would run contrary to Sections 5 and 20 of the Liquor Control Act.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TAXATION AND REVENUE: County court may compromise delinquent taxes on real estate before offered for sale, and also for deficiency sales under the provisions of 9953a and 9953b, Laws of Mo. 1933, in event of redemption thereunder and provided, that such sales were consummated before such statutes were repealed.

November 25, 1940

11/m

FILED
35

Hon. Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

We desire to acknowledge your request for an opinion with reference to the Jones-Munger Law on October 8, 1940, which is as follows:

"I would like to have your opinion on the following question:

Can the County Court make a compromise settlement of delinquent taxes upon lands which a certificate of purchase has been redeemed?

The situation we have is this: The owner of the land within the redemption perion, in accordance with the Jones-Munger Law, paid the collector of revenue the necessary sum to redeem the lands and a redemption certificate was issued. Now the owner of the land has asked the County Court to compromise the delinquent taxes due on the lands, including the year for which the land was sold and then redeemed."

We desire also to acknowledge receipt of your supplemental letter of October 12, 1940, which is as follows:

"I have your letter of the 10th saying you would like to know whether the sale mentioned in my letter to you of October 8 was first, second or third sale. I do not know the particular year, but I understand it was a first sale. However, I would like to have the opinion covering first, second and third sales. As I understand it, of course, under the 1939 amendment, there is no

redemption from the sale and the purchaser is entitled to his deed.

I would appreciate your opinion on these questions."

A sale of land for delinquent taxes on real estate under the provisions of Section 9952c Laws of Mo. 1933, page 431 is made only when the bid is adequate to pay the taxes, interest and charges thereon.

Such tract of land can be reoffered under the provisions of Section 9533 thereof only when the first bid is for an insufficient sum to pay the taxes, interest and charges thereon. Said Section 9953 provides in part as follows:

"If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this act provided, if such lands or lots be at such time delinquent."

Section 9953a thereof is as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shal acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales." (Underscoring ours.)

Redemption from each sale--and resale for a deficiency in the third sale--may be had under the provisions of Section 9953b thereof which is as follows:

> "Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from deliqnuent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Therefore the county court would have no further interest in the first or second sale, with reference to compromise of taxes, because the payment of all taxes, penalties, interest and costs was a prerequisite to the issuance of a certificate of sale under such first and second sale.

Senate Bill 511 and Section 9953a thereof, Laws of Mo. 1939, page 850, which was in full force and effect at the time of the 1939 tax sales on real estate, repealed Section 9953a and 9953b supra. Under the provisions of said Section 9953a Laws of Mo. 1939 a sale by the collector entitled the purchaser to the delivery of a deed thereby eliminating redemption from such sale. It further provided the following condition as a prerequisite to the delivery of such deed:

> "In the event the real purchaser at any sale to which this section is applicable shall be the owner of the lands or lots purchased, or shall be obligated to pay the taxes for the non-payment of which such lands or lots were sold, then no collector's deed shall issue to such purchaser, or to anyone acting for or on behalf of such purchaser, <u>without payment to the collector of such additional amount as will discharge in full all delinquent taxes, penalty, interest and costs.</u>" (Underscoring ours.)

There could be no question of compromise of delinquent taxes on real estate with the owner under this section because he is required to pay <u>all</u> the taxes before he may acquire his deed.

This leaves the question of compromise by the county court applicable to only a third sale consummated under the provisions of Section 9953a Laws of Mo. 1933 supra where such sale was made for less than all the taxes, penalties, interest and costs and there was a redemption therefrom, and also to delinquent taxes on real estate which has not been offered for sale.

Section 9950 Laws of Mo. 1933 page 427 is the statute which gives to the county court its authority to compromise back taxes and is in part as follows:

> "Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot * * * *."

CONCLUSION

Therefore it is the opinion of this department that the county court may compromise back taxes under the provisions of Section 9950 supra for which the land has not been offered for sale, also for deficiency sales under the provisions of Sections 9953a and 9953b Laws of Mo. 1933 supra in event of redemption therefrom and providing

that such sales were consummated before said sections were repealed by said Section 9953a Laws of Mo. 1939 supra.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

SVM:RES

ELECTIONS: Nominees for office in city of third class under alternative form of government.

3/23

FILED
36

March 22, 1940

Hon. V. B. Hall, Mayor,
Monett, Missouri

Dear Sir:

This letter confirms telegraphic acknowledgment of your wire asking for an opinion upon the following question:

> "May a party be nominated under Section No. 6910 who did not file as a candidate in the primary, but name written therein by voters."

Section 6910 R. S. Mo. 1929 sets up a complete method for the nominating of officers in a city of the third class under the alternative form of government. It provides in part as follows:

> "Candidates to be voted for at all general municipal elections at which a mayor and councilman are to be elected under the provisions of this article shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those selected in the manner hereinafter prescribed. The primary election for such nomination shall be held on the second Tuesday preceding the general municipal election. The judges of election appointed for the general municipal election shall be judges of the primary election, and it shall be held at the same places so far as possible, and the polls shall be opened and closed at the same hours, with the same clerks as are required for said general municipal election. Any person desiring to become a candidate for mayor or councilman shall at least ten days prior to said primary election file with the city clerk a statement of such candidacy in substantially the following form:"

The laws authorizing primary elections are enacted by the General Assembly under the police power of the state to prevent dishonesty in procuring nominations.

"Statutes passed in the exercise of the police power of the state should be strictly construed." 59 C. J. Par. 656, p. 1106.

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute." State ex rel. Stevens v. Wurdeman, 246 S. W. 189, l. c. 194.

"The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction." State ex rel. v. Hackmann, 314 Mo. 33.

"Where the language of a statute is clear and unmistakable, its meaning clear and unambiguous, there is no room for construction." State ex rel. v. Thompson, 5 S. W. (2d) l. c. 57.

In Section 6910 the legislature speaks quite plainly. It provides that no one shall be placed upon the official ballot who has not complied with the requirements of the section and been nominated in accordance therewith.

CONCLUSION.

It is the conclusion of this Department that the city clerk would not be authorized to place on the official ballot for the city election, as a nominee, the name of any person who had not been nominated in accordance with the provisions of Section 6910.

Respectfully submitted,

W. O. JACKSON,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

MARRIAGE LICENSES: In discretion of recorder whether or not applicants for licenses are required to appear personally.

February 9, 1940

2-14

FILED
37

Honorable B. D. Hardesty
Circuit Clerk
Lincoln County
Troy, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 6, 1940, in which you inquire as to whether or not applicants for marriage licenses must appear personally before you in order to secure same.

Section 2977, R. S. Mo. 1929, provides that licenses must be obtained for all marriages, and that all marriages thereafter contracted should be invalid unless such licenses have been obtained.

The following section, 2978, R. S. Mo. 1929, provides that the recorders of the several courts in the City of St. Louis shall issue a license to any person entitled to the same, and sets out the form to be used.

At no place in Chapter 19, R. S. Mo. 1929, relating to marriages, is there an expressed provision requiring both applicants for a license to personally appear, and it is necessary to consider all sections thereunder in order to arrive at the legislative intent.

Section 2974, R. S. Mo. 1929, is as follows:

> "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and negroes or white persons and Mongolians, and between persons either of whom is insane, mentally

> imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void; and it shall be unlawful for any city, county or state official having authority to issue marriage licenses to issue such marriage licenses to persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of this section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock." (Italics ours)

Since the foregoing section makes it a misdemeanor for a recorder to issue a license to those related within a certain degree, or disqualified by reason of race or mental incapacity, we are unable to see how such fact could be determined except by virtue of an examination of the parties as to their qualifications.

Section 2983, as amended by Laws of Missouri, 1939, at page 509, is as follows:

> "No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or any female under the age of eighteen

> years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-one years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

This section contemplates that any male under the age of twenty-one years or any female under the age of eighteen years must be accompanied by his or her parent or guardian to the recorder since such parent or guardian's consent "must be given at the time". The section further contemplates that the recorder state in each license the age of the parties, and it is apparent that he must determine the age from the parties themselves in the absence of any other proof which would be difficult to obtain.

In an abundance of caution, the legislature further provided in Section 2984 that any recorder issuing a license contrary to the provisions of Chapter 19, should be guilty of a misdemeanor.

Two sections which indicate that the presence of both parties is not necessary are Sections 2978 and 2980. In Section 2978, we find the following:

> "The recorders of the several counties * * * shall, when applied to by any person legally entitled to a marriage license * * *"

And in Section 2980, the following:

> "If any recorder wilfully neglect or refuse to issue a license to any person legally entitled thereto on application * * *"

There appear to be no decisions in this state, or in any other jurisdiction with similar statutes, which have passed on this question. Since the only person who can be penalized by the issuance of a license which does not set out the true facts is a recorder, it appears that it should be properly left to his determination whether the issuance of a license is proper under the facts.

It is therefore the opinion of this department that it is entirely within the discretion of the recorders of the several counties and the recorder of the City of St. Louis whether or not they shall cause the applicants for a marriage license to appear in person for the purpose of procuring such license.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC

PENSIONS:
STATE SOCIAL SECURITY COMMISSION:

Regulation refusing to permit persons 65 years of age to file application for six months is unreasonable and contrary to law.

February 20, 1940 7/22

FILED 37

Hon. Roy Hamlin
Majority Floor Leader
Missouri House of Representatives
Sixtieth General Assembly
Hannibal, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of February 7, 1940, which reads as follows:

> "The Hannibal office of the Social Security Commission are refusing to give applications for Old Age Assistance to persons sixty-five and over unless they are on relief until after June 1st.
>
> "I have had numerous complaints recently in reference to this and am writing this letter asking your opinion as to whether or not the Social Security Commission can refuse to allow persons sixty-five and over to apply for assistance at this time, or if they have the authority to refuse to permit them to apply for six months longer."

A cardinal rule of construction of statutes is to ascertain and give effect to lawmakers' intent and this should be done from words use, if possible, considering the language honestly and faithfully. Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452.

Under the Federal Act it was mandatory that the State of Missouri reduce the age for persons qualifying for old age assistance to sixty-five years by January 1, 1940, or forfeit federal participation.

Under the Federal Social Security Act an appropriation was made available to be used for making payments to states which have submitted and had approved by the Federal Social Security Board state plans for old age assistance. Section 301, Title I, Chapter 7 of the Federal Social Security Act reads as follows:

"TITLE I -- GRANTS TO STATES FOR OLD-AGE ASSISTANCE

Section 301. Appropriations

"For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to aged needy individuals, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of $49,750,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of sections 301 to 306 of this chapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Social Security Board established by section 901 of this chapter (hereinafter referred to as the 'Board'), State plans for old-age assistance. (Aug. 14, 1935, c. 531, Title 1, Sec. 1, 49 Stat. 620.)"

Under Section 302 of this same Act it provides under what conditions the Federal Social Security Board shall approve any state plan and one of the pre-requisites for approval is that it shall not accept and approve any plan which imposes as a condition of eligibility for old age assistance an age requirement of more than sixty-five years after January 1, 1940, and reads, in part, as follows:

> "(a) A State plan for old-age assistance must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim for old-age assistance is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Board to be necessary for the proper and efficient operation of the plan; (6) provide that the State agency will make such reports, in such form and containing such information, as the Board may from time to time require, and comply with such provisions as the Board may from

time to time find necessary to assure the correctness and verification of such reports; (7) effective July 1, 1941, provide that the State agency shall, in determining need, take into consideration any other income and resources of an individual claiming old-age assistance; and (8) effective July 1, 1941, provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of old-age assistance.

"(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for old-age assistance under the plan--

"(1) An age requirement of more than sixty-five years, except that the plan may impose, effective until January 1, 1940, an age requirement of as much as seventy years; or

* * * * * * * * * * * * * * * * * * * *"

At the general election held on November 8, 1938, the qualified voters of this State, by a majority of votes, almost two to one, adopted the following Constitutional Amendment:

"Amendment to Article IV, Section 47, Constitution of the State of Missouri-

"That Section 47 of Article IV of the Constitution, be and the same is hereby amended by striking out the last proviso from said section relating to pensions for persons over seventy years

> of age, and by inserting in lieu thereof the following: Provided, further, that nothing in this Constitution contained shall be construed as prohibiting the General Assembly from granting or authorizing the granting, under such conditions and regulations as may be provided by law, of pensions or assistance to persons over sixty-five years of age, who are incapacitated from earning a livelihood and are without means of support."

In compliance with the Federal Act and the Constitutional Amendment adopted by the voters of this State on November 8, 1938, the Sixtieth General Assembly repealed Section 12, page 474, Laws of 1937, which provided old age assistance shall be granted to persons who were seventy years of age and over, and enacted in lieu thereof a new section 12, page 735, Laws of 1939, with an emergency clause, which reads as follows:

> "Pensions or old age assistance shall be granted under this Act to any person who:
>
> "(1) is 70 years of age or over, which provision as to age shall be effective up to and including December 31, 1939; and after that date the provision as to age for the purpose of qualifying for a pension or old age assistance under the provision of this section shall be 65 years of age or more;
>
> "(2) is incapacitated from earning a livelihood and has not sufficient income or other resources, as described in Section 11, to provide a reasonable

subsistence compatible with decency and health, and is without adequate means of support;

"(3) has resided in the State for five years or more within the nine years immediately preceding application for assistance and for the one year next preceding the date of application for assistance."

The above provision became effective on the 28th day of February, 1939.

In view of the foregoing, it was evidently the full intention of the qualified voters at the general election on November 8, 1938, as well as the Sixtieth General Assembly, that Section 12, Laws of 1939, supra, shall become effective on the 28th day of February, 1939, and that after March 1, 1940, persons sixty-five years of age and over may apply for old age assistance. This was done so that the State of Missouri may receive federal participation.

The State Social Security Commission has been specifically granted powers to adopt rules and regulations in administering this Act. However, said rule and regulation shall not be inconsistent with the Constitution and the Laws of this State.

Section 4, page 470, Laws of 1937, reads in part as follows:

* * * * * * * * * * * * * * * * * * * *

"The State Commission shall also have power and it shall be its duty:

"(1) To adopt, amend, and repeal rules and regulations not inconsistent with the Constitution or laws of this State.

* * * * * * * * * * * * * * * * * * * *"

Section 14, Laws of 1937, page 474, provides an application shall be filed in the county office, and reads as follows:

> "Application for any benefits under any law of this state administered by the State Commission acting as a state agency shall be filed in the county office. Application for aid to dependent children shall be made by the person with whom the child will live while receiving aid. All applications shall be in writing, or reduced to writing upon blank forms furnished by the State Commission, and shall contain such information as may be required by the State Commission or by any federal authorities under the Social Security Act and amendments thereto. The term benefits as used herein or in this Act shall be construed to mean:
>
> "(1) Pensions or old age assistance;
> (2) aid to dependent children;
> (3) aid or public relief to individuals in cases of public calamity;
> (4) money or services available for child welfare services;
> (5) any other grant, aid, pension or assistance administered by the State Commission."

Section 15, page 475, Laws of 1937, provides when the application is received an investigation and record shall be promptly made, and reads as follows:

> "Whenever the county office receives an application for benefits an investigation and record shall be promptly made of the circumstances of the applicant by the county office in order to ascertain the facts supporting the

> application. Upon the completion of such investigation the State Administrator, or some one designated by him, shall decide whether the applicant is eligible for benefits and if entitled to benefits determine the amount thereof and the date on which such benefits shall begin. The Secretary of the County Commission shall notify the applicant of the decision."

Section 16, page 736, Laws of 1939, in part, reads as follows:

> "If an application is not acted upon within a reasonable time after the filing of the application or is denied in whole, or in part, or if any benefits are cancelled or modified under the provisions of this Act, the applicant for pensions, or old age assistance, or aid to dependent children, shall be notified at once and may appeal to the State Commission, * * *"

These statutory provisions all clearly indicate the Legislature never contemplated the State Social Security Commission should refuse at any reasonable time to permit any person to file an application for old age assistance. It does, however, under Section 16, provide for an appeal if the application is not acted upon within a reasonable time after the filing of same.

In answering your request, we are assuming that the State Social Security Commission has adopted a rule or regulation denying persons sixty-five years of age and over the right to apply for old age assistance for at least six months. To answer this request, we must try to determine what would be a reasonable regulation, and whether or not said regulation super-

sedes the Constitution and the Laws of the State.

It is fundamental that to deny the Legislature the right to delegate the power to determine some fact upon which the enforcement of an enactment depends would stop the wheels of government.

Cooley's Constitutional Limitations, Vol 1, 8th Ed. page 231, makes the following statement regarding the important part boards and commissions now play in the administration of our laws, as follows:

> "Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purposes of a statute and various governmental powers for the more efficient administration of the laws."

Volume 12, C. J. page 845, Section 329, in part, lays down the well settled law in this State as to just how far a board or commission may go in promulgating rules and regulations for the enforcement of any statutory provision, which reads as follows:

> "Especially may the legislature authorize an administrative officer or body to make rules and regulations relating to the administration or enforcement of the law. Thus congress may confer on the president authority

to make rules and regulations for the government of the militia and for calling them into active service, on the secretary of the treasury the power to establish standards to which imported articles of a certain kind must conform, on the secretary of agriculture authority to establish regulations to prevent the spread of contagious diseases of animals, on the secretary of war authority to prescribe rules and regulations for the use, administration, and navigation of canals operated by the government, and to determine whether bridges across navigable streams constitute unreasonable obstructions to navigation, on harbor supervisors power to prescribe limits within which refuse and other material may be dumped, and on certain executive officers, such as the secretary of the interior and the secretary of agriculture, authority to prescribe rules governing the forest reservations, and may require such executive officers to enforce their opinions and rulings by proceedings in the courts; and a state legislature may authorize executive officers to regulate the packing and marking of oleomargine, to fix minimum standards and define specific adulterations under a pure food and drug act, to regulate transportation of live stock within the state, and to make pilotage regulations. The power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated, that is to say, must be confined to details for regulating the mode of pro-ceeding to carry into effect the law as it has been enacted, and it cannot be extended to amending or adding to the requirements of the statute itself; but it is presumed that regulations adopted were to carry out only

> the provisions of the statute and not to embrace matters not covered, not intended to be covered, thereby. Rules that operate to subvert the statute may not be framed under a delegation of power to the executive."

Volume 12, C. J. page 847, Section 330, reads as follows:

> "While the power to make laws may not be delegated to a board or commission, nor may the legislature, without prescribing any standard of exemption, leave it wholly to the discretion of a commissioner to exempt persons from the operation of a statute, yet, a certain policy or rule having been prescribed by statute, matters of detail in carrying out the executive duty of giving effect to the legislative will may be left to boards or commissioners. The interstate commerce commission is a conspicuous illustration of this rule."

In Gregory v. Kansas City, 244 Mo. 523, l. c. 550-51, the court said:

> "Respondents also assail the constitutionality of the civil service provisions of the new charter of Kansas City, on the ground that the said charter delegates legislative powers to the board of civil service commissioners therein provided for, citing article 9, section 17, Constitution of Missouri, which provides that cities adopting special charters must have a mayor and 'two houses of legislation.'

> "The power granted to the civil service commissioners to prepare and promulgate rules for conducting the examination of applicants for appointment in the competitive class of the classified civil service of Kansas City does not confer upon said civil service commissioners legislative powers.
>
> "The right of legislative bodies (or the people) to confer authority upon executive boards to prescribe rules for putting in force the powers and duties conferred upon such boards is fully recognized in the following cases: State v. Hathaway, 115 Mo. 36, l. c. 47; State v. Doerring, 194 Mo. 398; Opinion of the Justices, 138 Mass. 601; The People v. Kipley, 171 Ill. 44; State ex rel. v. Frear, 146 Wis. 291; People v. Chicago, 234 Ill. 416."

In Wyeth v. Thomas, 23 L. R. A. New Series, 147, l. c. 151 and 152, the Board of Embalmers in the State of Massachusetts promulgated a rule that no one could reform the duties of an undertaker without having procured a license of the Board of Registration in Embalming. Regarding the validity of this rule, the Supreme Court of Massachusetts said:

> "We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health, as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation, within the exercise of the police power by the state. If such a regulation had been made by an act of the legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to

affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

* * * * * * * * * * * * * * * * * * * *

"We decide that the refusal of the respondents to grant the petitioner a license as an undertaker, solely for the reason that he is not licensed as an embalmer, is unwarranted, improper, and illegal. According to the report upon this determination of the question of law, a writ of mandamus is to issue. * * * * * * *"

Also, in United States v. Grimaud, 55 L. Ed. 563, l. c. 569, the court held that the Legislature cannot delegate its power or make a law but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

"And again he said in Marshall Field & Co. v. Clark, 143 U. S. 694, 36 L. ed. 310, 12 Sup. Ct. Rep. 495:

* 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise

> and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.' * * * **"

* *

"That 'Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' Marshall Field & Co. v. Clark, 143 U. S. 692, 36 L. ed. 309, 12 Sup. Ct. Rep. 495. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."

In Field v. Clark, 12 S. Ct. Rep. 495, l. c. 505, the court said:

"'The true distinction,' as Judge Ranney, speaking for the Supreme court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Railroad Co. v. Commissioners, 1 Ohio St. 88. In Moers v. City of Reading, 21 Pa. St. 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is con-

> fided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in Locke's Appeal, 72 Pa. St. 491; 'To assert that a law is less than a law because it is made to depend on a future event or an act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.'
>
> "What has been said is equally applicable to the objection that the third section of the act invests the president with treaty-making power."

While we have not found any case wherein this identical question was raised, we do conclude from what has been heretofore said and the decisions hereinabove cited, that the Legislature never contemplated that the State Social Security Commission should refuse to permit any person to file his application for six months after the request to file same was made. There might be some extenuating circumstances for refusing to permit a person to file an application as of the day he appears to make known his desire to file his application. We are of the opinion that the Commission may prescribe and regulate the

manner in which this may be done. It is within their discretion to prescribe some systematic manner of filling out and receiving said application in order to avoid such confusion and disorder. But such regulations must be reasonable and not capricious or arbitrary and must conform to the law.

To hold that the State Social Security Commission is authorized to refuse to permit the filing of an application for six months would defeat the very purpose of the recent constitutional amendment by the qualified voters of this state, and the recently enacted amendment to the State Social Security Act permitting one sixty-five years of age and over to apply for old age assistance on and after the 1st day of January, 1940. In fact, this would be, in effect, legislating. It would supersede the law as enacted by the Legislature.

Therefore, it is the opinion of this Department that such a regulation does not conform to the State Social Security Act, but supersedes it and is invalid.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:RV

ELECTIONS: County Clerk prepares and delivers **ballots** used in primary and general elections.
County Clerk publishes notices of calling of primary election.
County Clerk publishes notice showing the nominees for offices.
Board of Election Commissioners publishes notice of general election.

May 14, 1940

5-14

37

Mr. John H. Hardin, Chairman
Board of Election Commissioners
Court House
Independence, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated April 5, 1940, which reads as follows:

> "Under date of March 30, 1938, your office gave to the Jackson County Board of Election Commissioners an opinion in which you stated that said Board of Election Commissioners, outside of Kansas City, Missouri, should publish notices of Elections and provide ballots and all other necessary supplies for Elections. This opinion was given by Mr. Harry H. Kay of your office.
>
> "In a Conference with the County Clerk of this County today in regard to the necessary preliminaries for the Primary Election, the Clerk stated that he desired a more recent opinion on the point of printing ballots and supplies for said Election, and our understanding is that he is writing you today for such an opinion. If a new opinion is prepared and given

we should be pleased to have you mail a copy to us at our office in Independence.

"We should also appreciate it if you would give us your opinion as to just where the duties of the County Clerk cease, and the duties of the Jackson County Election Board begin, in the matter of arranging for the Primary Election, giving notices thereof and preparing ballots and supplies for same. Under Article 5, of Chapter 61, covering Primary Elections, by Section 10256, the County Clerk publishes a notice of the offices to be filled. We understand from the following sections that all filings for county offices should then be made with the County Clerk, that he should publish the names of the candidates (Section 10262), and distribute sample ballots to the candidates as provided by Section 10265. Would the County Clerk carry on under this Article until ten days prior to the Primary Election (when the time for withdrawal of names ceases), and then certify the list of candidates to the Election Boards, and the Boards then proceed to prepare ballots and supplies and conduct the Primary Election?

"Because of apparent conflicts in the statutes, here in Jackson County the County Clerk has been publishing notices of the Election and the Election Board doing the same. In your opinion should this be done to avoid any question of the legality of notices under out statutes?"

The main question which you are asking in your request is whether or not the county clerk should publish the notice of the registration for and the

election under the general election. I am presuming that you do not require an opinion as to the notice of registration and primary election. The other main question which you ask is whether or not the Board of Election Commissioners of Jackson County are authorized to provide ballots and all other necessary supplies for not only the general election but also for the primary election.

There are many sections of the statutes which are applicable to the above two questions.

I

We will first set out the sections applicable under Article 15, Chapter 61, R. S. Missouri, 1929, which applies to Board of Election Commissioners in counties having a population of 150,000 or more. The population of Jackson County, as shown by the last decennial census was 470,454 and is governed by the provisions of Article 15, Chapter 61, R. S. Missouri, 1929, in setting up the powers and duties of Boards of Election Commissioners.

Section 10513, Article 15, Chapter 61, R. S. Missouri, 1929, provides that the Board of Election Commissioners shall provide two registration books for each election district in their counties.

Section 10512 R. S. Missouri, 1929 provides for the registration by the Board of Election Commissioners at certain times before the state primary or general election.

Section 10514, R. S. Missouri, 1929, provides that the Board of Election Commissioners shall deliver, or cause to be delivered by the sheriff, the registration books to the various registering officers at least three days before the time set for any registration.

Section 10518 R. S. Missouri, 1929, provides that

the Board of Election Commissioners shall deliver the registration books on the day before the election to the judges of election and receive a receipt therefor.

Section 10519 R. S. Missouri, 1929, provides for the delivery of two blank books to the judges and clerks which shall be called "verification books." Section 10524, R. S. Missouri, 1929, provides for a notice of publication of an intermediate registration.

Section 10525 R. S. Missouri, 1929, reads as follows:

> "The board of election commissioners created hereunder and hereby shall have full and complete power to conduct any and all elections in such county and to receive and certify the returns thereon. And it shall be the duty of said board of election commissioners to certify such returns to the proper officer upon whom falls the duty of issuing certificates of election. Said board of election commissioners shall also have full power and authority to make any necessary rules and regulations for the conducting of the business of said board and for the expeditious and efficient handling of the business of said board and of the board of registry thereof."

Under the above section it will be noticed that the Board of Election Commissioners who have been appointed under Article 15, Chapter 61, R. S. Missouri, 1929, shall have full power and authority to make any necessary rules and regulations for the conducting of the business of said board. It will also be noticed under this section that no authority is specifically granted allowing the Board of Election Commissioners to prepare and furnish ballots for either a primary or general election.

Section 10531 R. S. Missouri, 1929, reads as follows:

> "It shall be the duty of said board of election commissioners to publish notice in at least two weekly newspapers, of general circulation and of opposite politics, if possible, published in the county, for four weeks prior to each general registration and election, giving the time and place of such registration and election."

It will be noticed under this section that the Board of Election Commissioners should publish notice in certain papers for four weeks prior to each general registration and election, giving the time and place of such registration and election. All of the above sections referred to and set out are under Article 15, Chapter 61, which applies to Boards of Election in counties having a population of over 150,000 and in section 10531, supra, it will be noticed that it is the duty of the Board of Election Commissioners to publish notices of registration and election at the general election, but not on a primary election. After careful research of Article 15, Chapter 61, we cannot find any authority granting the Board of Election Commissioners, as governed by said article, to prepare and furnish ballots in any election.

II

There are many sections in Article 5, Chapter 61, R. S. Missouri, 1929, which are applicable as to the duties of the county clerk under the general election law. We will refer to and quote a few sections which are applicable to the questions asked in your request.

Section 10299 R. S. Missouri, 1929, reads as follows:

> "Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. Ballots other than those printed by the respective clerks of the county courts according to the provisions of this article shall not be cast or counted in any election."

Under the above section it is the duty of the clerk of the county court to provide printed ballots for every election for public officers in his county. It also provides that ballots other than those printed by the clerks of the county courts shall not be cashed or counted in any election.

In the case of Bradley v. Cox, 271 Mo. 438, 197 S. W. 88, l.c. 90, the court said:

> "He must receive from the judges and must use in voting the ballot prepared by the county clerk."

Also, under Section 10301 R. S. Missouri, 1929, whenever the Secretary of State has duly certified to the clerk of each county any proposition for question to be submitted to a vote of the people in which ballots are used marked "yes" or "no." It is the duty of the county clerk to prepare and distribute such ballots.

Under Section 10305, R. S. Missouri, 1929, before the opening of the polls at any election for public officers within any county, the clerk of the county court shall deliver or have the sheriff deliver, to the judges of election of each election district, the ballots.

Section 10265 R. S. Missouri, 1929, reads as follows:

> "At least twenty days before the August primary in any year when a primary election is held, each county clerk shall prepare sample official ballots, placing thereon alphabetically, under the appropriate title of each office and party designation, the names of all candidates to be voted for in the precincts of his county. Such sample ballot shall be printed upon tinted or colored paper, and shall contain no blank endorsement or certificate. Such clerk shall forthwith submit such ticket of each party to the county chairman thereof, and mail a copy to each candidate to his postoffice address,as given in his declaration paper, and he shall post a copy of each sample ballot in a conspicuous place in his office. On or before the 10th day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, except that the number of ballots to be furnished to each precinct shall be one and a half times the number of votes cast by any party in the last preceding election and having nominees and tickets at such primary election."

This section specifically states that on or before the 10th day before the holding of any primary election the county clerk shall prepare sample ballots which shall

be submitted to the county chairman and post copies of the sample ballot in his office and it specifically states that on or before the 10th day before the holding of any primary election the county clerk shall print and distribute the ballots as in the case of the general election.

Section 10261 R. S. Missouri, 1929, reads as follows:

> "At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."

Section 10262 R. S. Missouri, 1929, reads as follows:

> "Such clerks shall, upon receipt thereof, publish, under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the hours during which the polls will be opened, and that the primary will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

Under section 10262, supra, it was the duty of the county clerk to publish three consecutive weeks prior to said primary the names of parties who have filed for office. In this notice he also gives the date,

the place and the hours of the polls. Under section 10261, supra, it is very noticeable that the Secretary of State notifies the county clerks and not the Boards of Election Commissioners. Section 10308 R. S. Mo., 1929, provides that the county clerk of each county shall cause to be printed and provide certain cards to be posted in the election compartment which shall be called "instructions to voters."

Section 10249 R. S. Missouri, 1929, reads as follows:

> "At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election. Provided that no higher rates shall be paid per inch, than is provided by section 13773, chapter 114, R. S. 1929, as amended."

Under the above section it is the duty of the county clerk to publish in certain newspapers the nomination of officers certified to him and filed in his office. It also provides that the publication shall appear in each newspaper upon the last day upon which such newspaper is issued before the election. This publication is probably the publication which you refer to in your request, in which you state that the county

clerk has been publishing notices of the election and the Election Board is doing the same. The notice under Section 10249, supra, is not a notice of an election, but merely a notice showing who had been certified as nominees on the different political tickets. We find no law which makes it a duty of the county clerk to publish any notice of the general election in counties that have more than 150,000 population; but the only notice that he should publish is as to the primary election. The only notice that we find for the publishing as to the date of the general election in counties of over 150,000 is section 10531, supra, which provides that the Board of Election Commissioners shall publish the notice.

Section 10265, supra, specifically states that the county clerk should print and distribute the ballots to the precinct officials and under Section 10299, supra, it is specifically stated that the clerk of the county court should provide printed ballots for any election. On the other hand, under Section 10525, supra, the section only states generally that the Board of Election Commissioners shall have full and complete power to conduct the elections. This section only applies as to the procedure of the election.

In the case of Kansas City, Mo. v. J. I. Case Threshing Machine Company, 87 S. W. (2d) 195, par. 13,14, 337 Mo. 913, the court said:

> "'It is a general rule of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; expressio unius est exclusio alterius.' 25 R. C. L. 981, sec. 229; 25 C. J. 220; 59 C. J. 980-986, secs. 580-583. 'Where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate.' Endlich on In-

terpretation of Statutes, 288, sec. 216; see, also, Endlich, 556-560, secs. 397-399; 2 Lewis-Sutherland Statutory Construction (2d Ed.) 916-922, secs. 491-493. In the latter work, it is said (p. 919, sec. 492): 'Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation, and any other which introduces a new rule, implies a negative.'

"The Supreme Court of the United States has held, where an act authorized a county to create a new liability and provided a mode of discharge (tax on property), that 'the mode prescribed is exclusive of all others.' Wells v. Pontotoc County Supervisors, 102 U. S. 625, 26 L. Ed. 122; see, also, Supervisors of Rock Island County v. U. S., 4 Wall. 435, 446, 18 L. Ed. 419; Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Smith v. Stevens, 10 Wall. 321, 19 L. Ed. 933. 'When the Legislature attempts to make a grant of power to a municipality and the same is doubtful or uncertain, all doubts and uncertainties are resolved against the municipality'; and 'powers conferred upon a municipality cannot be enlarged by liberal construction'; instead, 'enumeration of powers operates to exclude such as are not enumerated.' Van Eaton v. Sidney, 211 Iowa, 986, 231 N. W. 475, 477, 71 A. L. R. 820, and authorities cited; St. Louis v. Dreisoerner, 243 Mo. 217, 147 S. W. 998, 41 L. R. A. (N. S.) 177."

CONCLUSION.

In view of the above authorities, it is the opinion of this department, that the Board of Election Commissioners of Jackson County should publish the notice of the general election and furnish necessary supplies for the election other than the ballots and cards known as "Instructions to Voters."

It is further the opinion of this department that the county clerk shall prepare and furnish all ballots in both primary and general elections and should publish the notice of the primary election. He should also publish a notice of the names of nominees which publication should be at least in the last publication of the newspaper before the election. But the county clerk should not publish a notice of the election as set out in your request.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) ATTORNEY GENERAL.

WJB:RW

SUPPLEMENTAL OPINION TO OPINION 186. (ATTACHED)

ELECTIONS: In counties over 150,000 population having registration of voters county clerk prepares and delivers ballots.

June 1, 1940

6-1

FILED
37

Hon. John H. Hardin, Chairman
Board of Election Commissioners
Court House
Independence, Missouri

Dear Sir:

This is written to supplement an opinion written by W. J. Burke, Assistant Attorney-General and furnished you under date of May 14, 1940. The purpose of this supplemental opinion is to clarify the matter of the printing of ballots in Jackson County, upon which you requested an opinion in a letter of April 5, 1940, the first two paragraphs of which opinion request are herein set out:

> "Under date of March 30, 1938, your office gave to the Jackson County Board of Election Commissioners an opinion in which you stated that said Board of Election Commissioners, outside of Kansas City, Missouri, should publish notices of Elections and provide ballots and all other necessary supplies for Elections. This opinion was given by Mr. Harry H. Kay of your office.
>
> "In a Conference with the County Clerk of this County today in regard to the necessary preliminaries for the Primary Election, the Clerk stated that he desired a more recent opinion on the point of printing ballots and supplies for said Election, and our understanding is that he is writing you today for such an opinion. If a new opinion is prepared and given we should be pleased to have you mail a copy to us at our office in Independence."

In the opinion of Mr. Burke there are a great number of the sections of the statutes pertaining to your problem set out. However, there are a few which were omitted therefrom. These sections do not change the conclusion, but a reading of them will add to your information on the subject.

Jackson County having a population of more than 150,000 the provisions for the appointment of a Board of Election Commissioners and a registration of voters and conduct of elections are found in Article 15 of Chapter 61, which is referred to in Mr. Burke's opinion. There are two sections, Section 10525 and Section 10536 R. S. Mo. 1929, which prescribe the duties of the Board of Election Commissioners pertaining to the conduct of elections. Section 10525 provides that the Board of Election Commissioners shall have power to conduct all elections and certify the returns thereof. Section 10536, in part, provides as follows:

> "* * * Said election commission shall make all necessary rules and regulations not inconsistent with this article in reference to the registration of voters and conduct of elections and shall have charge of and make provisions for elections, general, special, local, municipal, state and county or any part thereof at any time to certify the returns thereof to the proper officers issuing certificates of election."

These two sections would indicate that it was the intention of the Legislature that the Board of Election Commissioners would take charge of the registration of voters and the conduct of the election and do all things necessary. However, a careful reading of the entire article fails to reveal any direction to the Board of Election Commissioners to take charge of the printing and distribution of ballots. While this power might be implied from these two sections above mentioned, there is no provision made for furnishing to the Board of Election Commissioners the names of candidates and nominees to be printed on ballots. This apparent omission could not be supplied. In the case of Dworkin v. Caledonian Ins. Co., 285 Mo. 342, l. c. 363, the Supreme Court said:

> "This court has declared: 'It is our duty merely to interpret it (a statute) exactly as made by the legislative department--we cannot properly add to it a meaning not intended by its terms.' (Henry & Coatsworth Co. v. Evans, 97 Mo. 1. c. 55.) The application of this rule is striking in what is called a casus omissus. The court may feel sure the Legislature meant to include something which by oversight was omitted, yet cannot supply it. (Kehr v. Columbia, 136 Mo. App. 1. c. 329; Smith v. State, 66 Md. 215; Woodbury v. Berry, 18 Ohio, 456.)"

Sections 10300 and 10302, found in Article 7, Chapter 61, R. S. Mo. 1929, are the general sections pertaining to the printing and distribution of ballots. Section 10300 directs the form of ballot and further directs the Secretary of State to certify to the various county clerks and Boards of Election Commissioners the names of candidates and nominees and party emblems. Section 10302 directs the distribution of ballots by the various county clerks and Boards of Election Commissioners. These sections would authorize the Board of Election Commissioners of Jackson County to take charge of the printing and distribution of ballots if they were applicable to Jackson County, but Section 10337, Article 7, Chapter 61, specifically provides as follows:

> "The powers and duties herein given to and imposed upon the clerks of the county courts of the several counties shall be exercised in reference to the city of St. Louis and to Kansas City, and to any other city hereafter having a registration of voters by the board of election commissioners of such city."

It will be noted that this section expressly limits Section 10300 and Section 10302, to cities.

CONCLUSION.

It is the conclusion of this department that the Legislature, having failed to make proper provision for the

Board of Election Commissioners to take over the printing and distribution of ballots, leaves the performance of that duty to the county clerk.

W. O. JACKSON
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

WOJ:CP

EXTRADITION: AFFIDAVIT BEFORE MAGISTRATE: AFFIDAVIT RE PECUNIARY INTEREST:

The sheriff of a county or any other party having no pecuniary interest should be permitted to make an affidavit before a magistrate, and the affidavit regarding pecuniary interest, for interstate rendition purposes.

August 16, 1940

8-20

FILED
37

Honorable Frank G. Harris
Lieutenant Governor
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated June 10, 1940, which is in the following terms:

> "I have before me a blank petition to be used in securing extraditions. On the back of it is an affidavit to be executed by the prosecuting witness, if and when he has pecuniary interests. The affidavit is to the effect that requisition for the fugitive sought is not for the purpose of collecting a debt or to allow anybody to travel at the expense of the state or to answer any private end whatever, but only to serve the ends of public justice. In some instances where the injured party, who should be the prosecuting witness, fails to make either the affidavit upon which the warrant is issued or the affidavit above mentioned, that this fugitive is not sought for the purpose of collecting a debt, the sheriff of the county upon the advice of the prosecuting attorney frequently makes both of these affidavits.
>
> I should like an opinion as to whether or not the injured party, who has a pecuniary interest, should make both of these affidavits mentioned or as to

> whether or not the sheriff of the county or some other party having no pecuniary interest should be permitted to make them."

I understand your question to deal particularly with offenses against property such as, for example, larceny, forgery, obtaining property by false pretenses, etc., where one citizen is most directly injured by the offense.

Article IV, Section 2 of the Constitution of the United States, in part provides:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

Section 5278, Revised Statutes of the United States, 18 U.S.C.A. Section 662 in part provides:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory

> to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

In the type of case here considered, and in all cases, the sheriff of the county or some other party having no pecuniary interest should be permitted to make the affidavit before the magistrate upon which the interstate rendition proceedings and the rendition warrant are based. The offense is one against the state and not solely against the individual citizen who is most directly injured in a pecuniary way by the offense.

As stated in Keeton v. Gaiser 55 S. W. (2nd) 302, 303, 331 Mo. 499, "the extradition of fugitives from justice as between the several states is governed by the Constitution and statutes of the United States, and federal decisions are controlling." We know of no constitutional or statutory provisions or federal decisions which would militate against the point stated above. The federal courts have ruled that a police officer and a deputy sheriff may make the affidavit before a magistrate upon which interstate rendition is based. In Riley vs. Colpoys (1936) 85 Fed. 2nd 282, l.c. 283, 284, 66 App. D. C. 116, the affidavit was made before a magistrate by one Holland, a member of the police department of the City of Detroit, Michigan. It was contended that the fugitive should not be returned to the demanding state "because the affidavit made by affiant Holland in support of the complaint did not state facts within his personal knowledge, but upon information only." The United States Court of Appeals for the District of Columbia ruled that the affidavit was sufficient, and at l.c. 283, 284 of 85 Fed. 2nd in part said:

> "We think that these facts justify the arrest of appellant in this jurisdiction and his extradition to the state of Michigan. The affidavit made by Holland to the original complaint was unqualified and absolute in form and not made upon information and belief. The magistrate, accordingly, was justified in issuing a warrant for the arrest of the accused, and a motion to quash such arrest upon the ground that the complaint was made upon information and belief would not be sustained. * * * * * * * * * * * *
>
> Upon these authorities we conclude that the warrant of arrest was lawfully issued by the magistrate upon the filing of the first affidavit by Holland, and that the writ of requisition issued by the Governor of Michigan was thereby justified."

In Raftery ex rel Huie Fong vs. Bligh (CCA Mass. 1932) 55 Fed (2nd) 189, l.c. 193, 195, it was said:

> "The main question raised by the assignments of error is whether the complaint and accompanying affidavit of Officer Mullen, charging the person demanded with the crime of murder in the state of Minnesota, are such a compliance with section 5278 of the Revised Statutes of the United States (18 USCA Sec. 662) as would authorize the Governor of Massachusetts in issuing his warrant for the arrest of the person demanded. * * * * * * * * * * * * *
>
> We are therefore of the opinion that the supporting affidavit of Mullen, in connection with the sworn complaint, met the requirements of the provisions of the Constitution and of the Revised

> Statutes above referred to, and were, as a matter of law, sufficient to justify the Governor of Massachusetts in the issuance of his warrant."

In our opinion, the sheriff or some other party having no pecuniary interest should be permitted to make the affidavit regarding pecuniary interest, which is referred to in your letter dated June 10, 1940, and which appears at the top of page two of the printed form of the petition for requisition. From the affidavit it appears that it is to be made by the prosecuting witness. The prosecuting witness intended by this form appears to be the person who made the affidavit before the magistrate upon which the rendition proceeding is based. The requirement by governors of various states of said affidavit regarding pecuniary interest grew out of a conference of the governors of several states regarding interstate rendition. The presence of pecuniary interest is a matter which the governor of an asylum state may consider in his discretion. The affidavit regarding pecuniary interest is not required by law.

In State ex rel Gaines vs. Westhues 2 S. W. (2nd) 612, l.c. 616, the Supreme Court of Missouri said:

> "Nothing that we have said must be considered as intimating that the Governor of the state upon which a demand is made for the surrender of an alleged fugitive from justice may not exercise his discretion in determining whether the demand is made for some ulterior or improper purpose, as, for example, the collection of a private debt. Because it is very generally held that, if he finds such to be the case, he may properly refuse to issue a warrant, even where the requisition papers are apparently sufficient and in due form. State v. Toole, 69 Minn. 104, 72 N. W. 53, 38 L.R.A. 224, 65 Am. St. Rep. 553; Work v. Corrington, 34 Ohio St. 64, 32 Am. St. Rep. 345. What we do say is that, in a proceeding on habeas corpus wherein the person held in custody under a rendition warrant

> seeks release, the motives underlying the institution of the prosecution against him in the demanding state cannot be considered by the court. This for two reasons: (1) The executive discretion in that respect is not subject to court review (Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188, 25 L.R.A. 813, 44 Am. St. Rep. 439); and (2) the matter of motive, in so far as it has any relevancy at all, is essentially one of defense, cognizable solely in the courts of the demanding state which have jurisdiction to hear and determine the criminal cause."

The Springfield Court of Appeals stated the same rule in Ex parte Ellis 9 S. W. (2nd) 544, l.c. 547.

The case of In Re Block (1898) 87 Fed 981, l.c. 984, was a habeas corpus proceeding arising out of interstate rendition in the District Court of the United States for the Western District of Arkansas, in which the petitioner was remanded to custody. The Court in part said:

> "The response also contains matter tending to show that the requisition papers have been set on foot and are instigated by malice, and not in good faith, and are intended to harass and annoy the petitioner. It is sufficient to say that these are matters which must either go to the courts in Illinois, or to the governor of the state of Arkansas, who issued the warrant. It is not a question that this court has a right to pass upon under habeas corpus. Nor do they, if true, constitute any predicate for affirmative relief by the court."

The term "prosecuting witness" is defined in a

note in 50 C. J. page 795 as "maker of preliminary complaint or affidavit." It is elsewhere defined, in an action for a penalty under a statute, as the person in whose name the suit was brought (6 Words and Phrases 1st Series p. 5736). Our conclusion that the sheriff should be permitted to make the affidavit regarding pecuniary interest is based on the foregoing definitions, the apparent meaning of the form, and the proposition that said affidavit is not required by law in any event. We believe these considerations should prevail although the term "prosecuting witness" was once defined as the person alleged to be injured by the commission of the offense (State vs. Christopher 149 N. W. 40, 41, 167 Iowa 109). Extradition laws should be construed "liberally to effect their important purpose". Biddinger vs. Commissioner of Police 245 U. S. 128, 38 Sup. Ct. 41, 43, 62 L. Ed. 193.

We believe the governor in the exercise of his discretion regarding pecuniary interest will be concerned chiefly with the motives of the person who actually instigated the prosecution, and that person is the one who made the original affidavit before the magistrate.

CONCLUSION

The sheriff of a county or any other person having no pecuniary interest should be permitted to make an affidavit before a magistrate, and the affidavit regarding pecuniary interest, for interstate rendition purposes.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RT

ELECTIONS: County Clerks should furnish ballots in counties having a population of more than 150,000.

September 20, 1940.

9-23

FILED
37

Hon. Nardin
Board of Election Commissioners
Court House
Independence, Missouri

Gentlemen:

Receipt is acknowledged of your letter of September 7th in which you asked for an opinion, as follows:

"Please give us your opinion at this time as to whether the Jackson County Election Board or the County Clerk should provide the ballots to be used in Jackson County (outside Kansas City) at the General Election to be held November 5, 1940.

"We are requesting this because of conflict of opinions in the past. We believe it has been the custom in the past (perhaps ever since the Board was first organized here) that the County Clerk provided the ballots for the Primary Election and the Board of Election Commissioners provided those for the General Election.

"Thanking you for your attention to this matter, we are"

The election laws are found in Chapter 61, R. S. Mo. 1929 and Amendatory Acts. Article 7 of this Chapter contains the general provisions for the printing and distribution of ballots. Section 10299 of this Article is as follows:

"Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots

> for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. Ballots other than those printed by the respective clerks of the county courts according to the provisions of this article shall not be cast or counted in any election."

Section 10300, as Amended Laws 1933, page 225, directs the form of the ballot.

Section 10301, directs the county clerk to furnish ballots whenever any question of proposition is to be submitted to the voters.

Section 10302 directs the number of ballots to be provided by the various county clerks and Boards of Election Commissioners and Section 10305 directs the county clerk to cause the ballots to be distributed to the judges of the various election precincts.

Section 10302 is limited in its application by Section 10337 to St. Louis City, Kansas City and other cities having registration of voters.

Article 15 of the above Chapter 61 creates Boards of Election Commissioners in counties having a population of more than 150,000 and provides the appointment of the Board and prescribes duties. We do not have the 1940 census report of Jackson County but, inasmuch as the population is 470,454, by the 1930 census, we are safe in assuming that it has not fallen below 150,000. This Article contains Section 10525, which is as follows:

> "The board of election commissioners created hereunder and hereby shall have full and complete power to conduct any and all elections in such county and to receive and certify the returns thereon. And it shall be the duty of said board of election commissioners to certify such returns to the proper officer upon whom falls the duty of issuing certificates of election. Said board of election commissioners shall also have full power and authority to

> make any necessary rules and regulations for the conducting of the business of said board and for the expeditious and efficient handling of the business of said board and of the board of registry thereof."

and Section 10536, which has the following provisions relating the duties of the Board of Election Commissioners:

> " * * * Said election commission shall make all necessary rules and regulations not inconsistant with this article in reference to the registration of voters and conduct of elections and shall have charge of and make provisions for elections, general, special, local, municipal, state and county or any part thereof at any time to certify the returns thereof to the proper officers issuing certificates of election: * * * "

These two last sections would seem to indicate that it might have been the intention of the Legislature to turn over to the Boards of Election Commissioners full control of the registration of voters and the conduct of elections. However, a careful search of the Article fails to reveal any specific direction to the Board of Election Commissioners who furnish ballots. This omission can not be supplied.

Section 10299 above referred to, having directed the county clerk to furnish the ballots, excludes any other method of providing them.

In the case of Kansas City, Mo. v. J. I. Case Threshing Machine Company, 87 S. W. (2d) 195, par. 13, 14, 337 Mo. 913, the court said:

> "'It is a general rule of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; expressio unius est exclusio alterius.' 25 R. C. L. 981, sec. 229; 25 C. J. 220; 59 C. J. 980-986, secs. 580-583. 'Where there are, in an act, specific provisions

relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate.' Endlich on Interpretation of Statutes, 288, sec. 216; see, also, Endlich, 556-560, secs. 397-399; 2 Lewis-Sutherland Statutory Construction (2d Ed.) 916-922, secs. 491-493. In the latter work, it is said (p. 919, sec. 492): 'Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation, and any other which introduces a new rule, implies a negative.'

"The Supreme Court of the United States has held, where an act authorized a county to create a new liability and provided a mode of discharge (tax on property), that 'the mode prescribed is exclusive of all others.' Wells v. Pontotoc County Supervisors, 102 U. S. 625, 26 L. Ed. 122; see, also, Supervisors of Rock Island County v. U. S., 4 Wall. 435, 446, 18 L. Ed. 419; Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Smith v. Stevens, 10 Wall. 321, 19 L. Ed. 933. 'When the Legislature attempts to make a grant of power to a municipality and the same is doubtful or uncertain, all doubts and uncertainties are resolved against the municipality'; and 'powers conferred upon a municipality cannot be enlarged by liberal construction'; instead, 'enumeration of powers operates to exclude such as are not enumerated.' Van Eaton v. Sidney, 211 Iowa, 986, 231 N. W. 475, 477,,71 A. L. R. 820, and authorities cited; St. Louis v. Dreisoerner, 243 Mo. 217, 147 S. W. 998, 41 L. R. A. (N. S.) 177."

CONCLUSION

It is the conclusion of this department that for all elections held in Jackson County, the county clerk should

furnish the ballots for all precincts outside the corporate limits of Kansas City.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

WOJ:LB

TAXATION:
COLLECTOR OF REVENUE:
RECOVERY OF EXCESS COMMISSIONS:
WHO MAY BRING SUIT FOR:

The county is not authorized to bring suit for excess commissions paid to the collector by taxpayers.

January 4, 1940

1-6

FILED

Honorable Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you state that the county collector of that county has apparently collected commissions on taxes in excess of that authorized by law; that he is taking the position that the act reducing his commissions was passed during his term of office and that under the Constitution his salary cannot be changed and for that reason he is entitled to collect commissions under the law which was in effect at the time he was elected. You state that this excess, if it be an excess, has been collected from a large number of taxpayers and you request the opinion from this office on the following question:

> "I would like an opinion from your office informing me whether or not the county could in any manner be construed as a real party in interest or whether there is any procedure by which the county could present a class suit for the benefit of these taxpayers."

On the second part of your request pertaining to the disbursement of school moneys by the county collector and of whether or not he is entitled to commissions thereon, I find that this office, on February 26, 1937, by an opinion to Honorable Forrest Smith, State Auditor, written by Mr. Harry G. Waltner, Jr., Assistant Attorney General, has covered this question. I am enclosing a copy of that opinion for your information.

Going back to your first question on whether or not the county court would be authorized to bring the suit for the taxpayers who have apparently paid excess commissions when they paid their taxes, we find that county courts and counties are limited in their powers to the provisions of the Constitution and statutes. Section 2078, R. S. Missouri 1929, only authorizes the county court to control and manage the property belonging to the county, so it would seem from this section that the county court would not be authorized to bring this suit for the aggrieved taxpayers.

Section 36 of Article VI of the Constitution of Missouri provides as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Under this section we do not think through the county court it would be authorized to bring a suit in which the county was not interested.

Section 9927, R. S. Missouri 1929, requires the county collector to make a monthly statement to the county court and to pay into the treasury all moneys received belonging to the county, but it will be noted that this section provides that the collector is not required to include in his payment into the county treasury his commissions.

Section 9935, R. S. Missouri 1929, which has been amended in 1933, 1935 and 1937, provides for the commissions which the various county collectors of the state may retain for their services.

Section 9934, R. S. Missouri 1929, provides

for the proceedings against a county collector who fails to pay into the state or county treasury the amount of taxes or revenue collected by him which are due the state or county. This section does not provide for any procedure against the collector in case he collects an excess commission from a taxpayer.

On the question of a member of the public recovering excess fees collected by a public officer, we find the rule stated in Volume 46 Corpus Juris at page 1031, Section 286:

> "A payment exacted by and paid to a public officer in excess of his legal fees in order to obtain the performance of his official duty, to which the payor is entitled without such payment, is compulsory, and may be recovered back; and in such a case it is not necessary that the payor should have protested against the payment. So, where fees are wrongfully exacted under an unconstitutional statute, they may be recovered as involuntarily paid. But where illegal fees are claimed as a matter of right by an officer, and are paid to him voluntarily, after his term of office has expired, and with full knowledge of the facts, they cannot be recovered."

It will be noted that the reasons given in the foregoing rule for recovery of such excess payments is that the member of the public who makes such payment is making it under compulsion and that it would not be necessary for such party to show that he had protested against paying such excess charges.

On the question of parties to a suit bringing an action by class representation, we think the rule is stated in Volume 47 Corpus Juris at page 40, Section 79 as follows:

> "The code rules as to parties to an action usually contain the provision that 'where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.'"

This rule is again stated in 61 Corpus Juris, page 1001, Section 1278:

> "* * * * * * * * * * * * * * *
>
> "One of a number of taxpayers who have paid illegal taxes may sue to recover on behalf of himself and the others, under a statute providing that, where a common or general interest is involved, or the parties are numerous, and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all; but in such case plaintiff must have a substantial interest in the controversy, and he cannot assume to represent others if his own pecuniary interest is a mere trifle. Nor can one taxpayer sue in behalf of others where the interest of each one is distinct, personal, and peculiar to himself."

It will be noted that the rule stated here is that the plaintiff, in such a case where he brings a class suit, must have a substantial interest in the controversy.

Class suits are brought under the code in this

state. It will be noted that in Castilo v. State Highway Commission, 312 Mo. 244, 253, a class suit was brought by the plaintiffs who sued in behalf of themselves and all resident citizens and assessed taxpayers of the State similarly situated and interested in the cause. From this it will be seen that such suits may be brought in this state.

If the collector has collected excessive fees, it seems that Section 3948, R. S. Missouri 1929, might apply. This section provides as follows:

> "Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

You speak of limitations of actions in your request. Of course, the one year statute for misdemeanors would apply as to this action.

On the question of a civil action, I think Section 863 R. S. Missouri 1929, would apply. This section provides as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

Since the collector exacts these fees in an official capacity, I am of the opinion that this section would apply to suits brought against him to recover the excess commissions.

CONCLUSION.

From the foregoing it is the opinion of this department that the county itself, or through the county court, could not present a class suit for the benefit of taxpayers who have paid excess commissions to the county collector.

Respectfully submitted,

TYRE W. BUNTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

RECORDER O' DEEDS: Required to settl(ith county court at the end of each year.

January 4, 1940

1-5

FILED
38

Honorable Frank W. Hayes
Prosecuting Attorney
Sedalia, Missouri

Dear Mr. Hayes:

This will acknowledge receipt of your inquiry of recent date, which reads as follows:

> "Some question has arisen in this county as to the proper construction of Section 11,568 dealing with surplus fees collected by the Recorder of Deeds. The section provides that the recorder's annual compensation shall be limited to $4,000.00 and requires the payment of the surplus fees into the county treasury for the benefit of the jury fund.
>
> "In this particular instance, the recorder has collected approximately $6,500.00 gross and after the expense of clerk hire will have approximately $5,000.00 left, net. Of this $5,000.00 he is entitled to $4,000.00. The question arises whether or not he is compelled to pay this $1,000.00 at the end of this year into the county treasury, or whether he may retain these surplus fees from year to year so that his yearly salary may be $4,000.00.
>
> "In other words, next year his net fees may not be enough to make his salary $4,000.00 and in such case would he be entitled to augment his salary out of the $1,000.00 surplus received for this

> year so as to bring his next year's salary up to the maximum of $4,000.00. A similar proposition might arise each year of his four year term.
>
> "To state the matter in another way, is the recorder required to settle with the county at the end of each year and turn in all surplus funds, or may he retain these surplus funds and settle with the county at the end of his four year term, so that he may be assured that his annual compensation will average $4,000.00, which is the maximum annual salary fixed by statute.
>
> "Will you please give me a construction of this statute at your earliest convenience so that due settlement may be made between the recorder of deeds and the county court."

Section 11568 of the statutes, to which you refer in your letter, reads as follows:

> "The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

In construing the foregoing section, we think the reasoning adopted by the Supreme Court in the case of Harrington v. The City of St. Louis, 107 Mo. 327, would be the correct reasoning to follow. In that case the Sheriff of the City of St. Louis was claiming the right to hold all the fees collected by his office for the entire term and to retain from said aggregate amount of fees enough to make his compensation for each year the maximum amount allowed by law. In his case, $10,000 was the maximum amount which he could retain for any one year, and he was claiming the right to hold out all fees until the end of his term and then retain for himself a total amount sufficient to make his compensation $10,000 for each and every year of his term. His term was two years, and consequently he was claiming the right to withhold $20,000 for the two years rather than having to settle at the end of each year. In passing upon that question, the Supreme Court said, l. c. 329:

> "There can be no doubt but the statements for each of the two official terms must be made the same as if the terms were held by different persons. This the circuit court held. But the court held that the sheriff could combine his accounts for the two years of the same term. The result of this ruling was to allow the sheriff to aggregate the receipts for the two years of the same term, then deduct the expenses for deputy hire, and retain for his own compensation $20,000, the excess, if any, to be paid over to the city. In this ruling the court erred. The section of the constitution before quoted declared in plain terms that the fees of no such officer, exclusive of salaries actually paid to his deputies, shall exceed the sum of $10,000, <u>for any one year</u>. This does not mean that the fees, over and above deputy hire, shall not exceed $20,000 for two years. The law itself divides the official term into years

> for all the purposes of applying the limitation as to the amount of fees which the sheriff may retain. Each year of the official term stands by itself. It follows that the sheriff must render a separate account of receipts and expenses for each year. When the fees for the particular year reach the amount of $10,000, with expenses added, the balance must be paid over to the city. The excess of one year cannot be carried into another year for the purpose of bringing the fees of that year up to $10,000, with deputy hire added. It is not the object of this law to make the clear compensation of the sheriff $10,000, per annum. His compensation for each year must come from the fees and emoluments of the office for that year, but when they reach the clear sum of $10,000, the balance must be paid over to the city."

It will be noted that the Supreme Court definitely held that "each year of the official term stands by itself" for the purpose of determining the compensation of the officer. In the present case it is clearly the intention of Section 11568 to limit the amount of compensation which the recorder may get for any one year. We do not think there is anything in the statute which indicates an intention that he should be guaranteed $16,000 for his term. His compensation is calculated on an annual basis and is limited to the sum of $4,000 annually. If the office should not earn $4,000 in any year, his compensation for that year would not reach the maximum, but presumably the legislature contemplated that if the fees were not earned, he should not be paid.

In the case of State ex rel. v. Pohlman, 60 Mo. App. 445, the foregoing case of Harrington v. City of St. Louis was cited with approval, and in this latter case the court said that the case of Harrington v. City of St. Louis held

"that each year of the official term stands by itself, and could not be helped out in its deficiency by any surplus earning of a succeeding year of the same term."

CONCLUSION

It is, therefore, the opinion of this office that the recorder of deeds in a county where the offices of recorder of deeds and clerk of the circuit court are separate must settle with the county court at the end of each year of his term, and that he may retain on such settlement not to exceed $4,000 for the year for which said report is made, provided his office has earned that amount for that particular year, but that said officer is not entitled to make up any deficit in earnings in any year from the surplus of earnings in any other year.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

HHK:HR

COUNTY BUDGET ACT: Section 17, Laws of Missouri, 1939, page 660, applies only to counties having a population of over 50,000 inhabitants.

January 23, 1940 1-23

FILED 38

Hon. Ellsworth Haymes
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

In reply to your request for an opinion on the following question:

> "In the Laws of Missouri, 1933, sec. 17 of an act providing for a county budget, at page 349, it provides that the county court may borrow up to 75% of their estimated revenue for the year, so as to run the county on a cash basis. I would like to know whether this applies to all counties or just counties over 50,000 population as mentioned in sec. 9 of this same act."

At the outset we want to call your attention to the fact that the sections of the Budget Law as are set out in Laws of Missouri, 1933, are numbered 12126a to 12126v inclusive, (See Mo. Stat. Ann. Vol. 9), and for the purpose of this opinion will be numbered according to these numbers rather than like they are numbered in Laws of 1933, and Laws of 1939.

It will be noted in Section 12126a that the first portion of the section reads as follows:

> "This act may be cited and quoted as the county budget law. All counties now or hereafter having a population of fifty thousand inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive, of this act. * * *"

As said in this section, 1 to 8 inclusive, has to do with counties under fifty thousand inhabitants and the remaining sections have to do with counties over fifty thousand inhabitants. In other words, the budget act presents two systems of procedure. The first eight sections govern counties of less than fifty thousand inhabitants, and the next sections regulate counties over fifty thousand inhabitants.

Your question goes to Section 17, Laws of 1933, and it will be noted in Laws of 1939, page 660, that the section 17 referred to in your letter is repealed and in lieu thereof a new section to be known as Section 17 relating to the same subject matter and provides for the registration of certain warrants and giving them preference and priority in payment. Now this section as is set out in Laws of 1939, carries the number in Mo. St. Ann. of 12126q. It will be noted that this section in substance follows the wording of Section 17 as it appears in Laws of 1933, except that "seventy-five per cent." was changed to "ninety per cent.", and this new section further provides for the registration of warrants and makes them preferred, etc. It will be further noted in Section 2, page 661, Laws of 1939, that Section 17 as set out in said act was repealed, and that Section 17 as appeared in Laws of 1933 was repealed, and that the new Section 17, or 12126q, was substituted as a new section in lieu thereof, and constituted a revision of said act. In other words, in the passing of Section 17 as it appears in the Laws of 1939, page 660, it was the clear intent of the Legislature that the new Section 17, or 12126q, was to take the same position in the budget law as did Section 17 of the 1933 Act.

Therefore, it is our opinion that Section 12126a when it says that counties having a population of fifty thousand inhabitants or less according to the last federal decennial census shall be governed by Sections 1 to 8 inclusive, and that Section 17 as was enacted and appeared in the Laws of 1939, page 660, still applies only to counties having a population of fifty thousand inhabitants or more.

In conclusion, it is the opinion of this Department that Section 17 of Laws of 1939, page 660, which said act also carries the number 12126q, Mo. St. Ann. Vol. 9, applies only to counties which have a population of over fifty thousand inhabitants.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:RV

ELECTIONS:
BOARD OF ELECTION COMMISSIONERS:
COMPENSATION OF ASSISTANTS:

Board of election commissioners in certain cities may fix the compensation of assistants and provide whether such compensation shall be for calendar days or for days which assistants are actually on duty.

January 25, 1940

FILED
38

Honorable Charles M. Hay, Chairman
Board of Election Commissioners
208 South Twelfth Blvd.
St. Louis, Missouri

Dear Sir:

This is in reply to yours of recent date requesting an opinion on the following statement of facts:

> "The Election Law of 1937 applicable to the City of Saint Louis provides in Section 81 thereof that certain assistants of the Board of Election Commissioners 'shall receive such salaries as the Board may determine, not to exceed $6.00 per day.'
>
> "The law in force at the time this act was passed (R. S. 1929, Section 10654) provided that the assistants I am now referring to 'shall receive not to exceed $6.00 per day for the time actually employed.'
>
> "The old act had the same provision with respect to the compensation of judges and clerks, to-wit: 'Precinct judges and clerks shall receive as pay $6.00 for each day or part of day while on duty, etc.'
>
> "The question on which I wish your opinion is this: Has the Board, under the law in force now, authority to pay the assist-

ants referred to at the rate of $6.00 per day for calendar days, without limiting the compensation to the days actually on duty as provided in the old law?"

The powers and duties of the board of election commissioners are purely statutory and that board must look to the statute for its authority.

On the question of the election commissioners employing assistants, we find that in Laws of Missouri 1937, at page 277, Section 81 it is provided as follows:

"The salaries of the Election Commissioners and assistants shall be paid one-half by any such City and one-half by the County in which such City is located, or if such City be not within a county, then such salaries shall be paid in full by such City. The members of such Board shall receive a salary of three thousand ($3,000) dollars per year each, payable monthly; the Chief Clerk shall receive a salary of three thousand ($3,000) dollars per year payable monthly; other assistants not exceeding seven in number, shall each receive salaries as the Board may determine, not to exceed twenty-four hundred ($2,400.00) dollars per year, payable monthly, and all additional assistants, if any, shall receive such salaries as the Board may determine, not to exceed six ($6.00) dollars per day. Precinct judges and clerks shall receive as pay six ($6.00) dollars for each day or part of day while on duty, except pay shall be allowed only for those days mentioned in this Act."

As stated in your letter, Section 10654, R. S. Missouri 1929, provided that the assistants to the election commissioners should r eceive, not to exceed six dollars per day, for the time actually employed. Since Section 81, supra, does not state that the compensation of six dollars per day shall not be limited to the time actually employed by such assistant, then you raise the question of whether or not the six dollars per day shall be paid during the time which the assistant is employed whether or not he is on duty.

It will also be noted under said Section 81 that the lawmakers, in authorizing the board of election commissioners in providing for additional assistants, also provided that these assistants would receive such salary as the board might determine not to exceed six dollars per day.

By leaving out of the new section the provision of said Section 10654 that the assistants were to be paid only for the days on which they were on duty, and by providing in the new section that the board might determine and fix their salaries, we think the question of whether or not such assistants would receive the pay provided by the board, whether or not they were on duty, was to be left to the board.

CONCLUSION.

From the foregoing it is the opinion of this department that the board of election commissioners, in determining and fixing the compensation of assistants to the board, may determine whether or not such compensation shall be paid at the rate of so much per day for calendar days, or whether or not such pay shall be limited to the days on which such assistants are actually on duty.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

SPECIAL ROAD DISTRICTS: County Court should make every effort to comply with the terms of Section 8026, R. S. Mo. 1929, and proceed to appoint commissioners.

April 2, 1940

FILED
38

Honorable Robert W. Hawkins
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

This Department is in receipt of your letter of March 5th, which is as follows:

"In re Bragg City Special Road District, Pemiscot Co., Mo.

"The above mentioned road district is organized under Article 9, Chapter 42, R. S. Mo., 1929, by order of the County Court of Pemiscot County, Missouri.

"At the time of the organization of this district Bragg City, Missouri, was a town, the duly elected officers consisting of a mayor and a Board of Aldermen, and was situated within the boundaries of Bragg City Special Road District.

"Subsequent to the organization of the Bragg City Special Road District, while the town of Bragg City has never been disincorporated, its citizens have ceased to elect city officials, and those who were elected have removed from the city, so that at the present time there are no officers of the town of Bragg City. At the present

time all of the original members of the Board of Commissioners of the special road district have removed from the district, except one, so that it is necessary to procure the appointment of succeeding members of the Board. Section 8026, R. S. Mo., 1929, Ann. Stat. p. 6837, provides, among other things, that the mayor and members of the city council within a special road district, together with the members of the county court, at a meeting to be held in the county court room, shall select and appoint succeeding commissioners, or, if the city or town is located more than ten miles from the meeting place of the county court, the mayor and city council of the town within the district may make written certificate of their choice, and transmit the same to the county court, and the same shall be given the same consideration as though the board and mayor were present at the meeting of the court.

"Interested taxpaying citizens have requested the county court to appoint succeeding commissioners for the Bragg City Special road district, but the court has refused to make the appointment because there is no acting mayor or board of aldermen of the city of Bragg City to serve with them in making such appointment, and has requested that I request your

opinion as to the power of the county court, acting on its own behalf, at the request of interested taxpaying citizens in the district, to make appointment of succeeding commissioners in this district."

You have quoted the pertinent part of Section 8026, R. S. Mo. 1929, which relates to the appointment of commissioners in the Bragg City Special Road District.

In the decision of State ex inf. Holt v. Meyer, 12 S. W. (2d) 489, it was held to the effect that neither the Mayor and the members of the Council nor the members of the County Court meet as officers of either the cities or the county but as representatives of the whole district for the sole purpose of appointing commissioners and that each is entitled to a vote.

In the decision of State ex rel. Richardson v. Baldry, 331 Mo. 1006, l. c. 1012, it would appear that the chairman of the meeting, as provided in Section 8026, is to determine the qualifications of those persons who present themselves to vote for the commissioners.

Coming closer to the real question which you present, and applying the real facts to the same, it appears that the officers of the town of Bragg City are still de facto officers if not de jure. We think the best manner in which to proceed would be to notify the former Mayor and other officers of Bragg City, as far as practicable, in compliance with Section 8026. As stated in the Meyer case, such former officers would not be acting in their former official capacity but as individuals representing the community. In other words, every effort should be made by the County Court to comply with Section 8026, and if the meeting is properly held and no one

objects to the procedure because the Council and Mayor of Bragg City are not officers of the city, or if the officers appear and attend the meeting and the vote is taken on the commissioners, we think that the commissioners so appointed would be legally appointed. The chairman of the meeting has discretionary powers and acts in an extra-judicial capacity in determining the qualifications of the parties who are entitled to vote.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVAL:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

SCHOOLS: State Superintendent of Schools has a right to withhold equalization quota funds from districts which do not employ teacher having 60 hours college credit.

April 19, 1940

4-7

FILED
38

Honorable C. R. Hayes
Prosecuting Attorney
Salem, Missouri

Dear Mr. Hayes:

This Department is in receipt of your letter of March 6th wherein you refer to the fact that you had previously written us several months ago concerning a question relating to the school laws. Your original letter was evidently lost as we appear to have no record of the same. The copy of your original letter is as follows:

> "I would like to have an opinion on the following: Under section 9270-v of the 1931 school law, the State Superintendent of Schools of Missouri ruled that a teacher must have sixty hours college credits before they will release the money (Equalization Quota) for the same. These districts have qualified under section 9270-n and 9270-0 of the 1931 school law, which superseded the section 9257. The State Superintendent of Schools has placed these under section 9257 and has given the teacher and attendance quota. They have been refused the money because they did not employ a teacher of 60 college hours credit."

At the outset there is no specific statute by which the State Superintendent of Schools requires or demands that a teacher have sixty college hours credit before releasing the funds under Section 20, Laws of Missouri 1931, page 346, which is designated as Section 9270v in the Missouri School Laws as prepared by Superintendent King, and likewise Sections 13 and 14, page 342, Laws of Missouri, 1931, and designated as Sections 9270-n and 9270-o.

A question similar to the one which you present is discussed in the case of Benton v. Windyville Consolidated School Distirct, 85 Mo. Ap., l. c. 91, and will be referred to later in this opinion. Many of the statutes to which we will refer are contained in that opinion, among them being Section 9444, R. S. Mo. 1929, providing in part that the State Superintendent of Schools shall exercise supervision of educational funds and secure the safety and correct application of such funds, and shall require information from school districts about the funds and conditions of schools and the management thereof.

Section 9446, R. S. Mo. 1929, refers to the fact that the Superintendent is required to inspect schools and make suggestions for improving the school in the care and upkeep and the government of same, and in every respect to elevate the standard and efficiency of the instruction. Section 9447, R. S. Mo. 1929, authorizes the State Superintendent of Schools to inspect and classify all public high schools in which certain standards are mandatory.

Section 20, Laws of Missouri 1931, page 346, provides that if the average daily attendance of any district shall be less than fifteen pupils, the State Superintendent shall in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, to require the board to provide for transportation of the pupils of such district to other schools

etc. It is our contention that the expression in Section 20, "to the best interests of all concerned," includes various elements by which the State Superintendent is vested with discretionary power in the matter. Among these elements is not only the question of the qualifications of the teacher as to possessing sixty hours of college credit, but such others as:(a) Working toward the realization of the standards of a first-class school; (b) Providing local funds to furnish needed repairs, replacements, and equipment; (c) Showing evidence of a willingness to support not only financially but cooperatively in other ways a sound educational program; (d) Providing a well qualified teacher; and (e) Considering the per-pupil cost and accessibility to other schools.

It has been the policy of the Department of Education that when there is cooperation between the State Superintendent and the various school boards, in that the boards are willing to meet the standards and recommendations for schools, and even though the attendance be numerically low, that the school is often permitted to be maintained by the Superintendent and the regular equalization quota state apportionment is granted as provided by law. But when the State Superintendent of Schools, in his discretion, is convinced that the proper school facilities will not be offered for maintaining the school in the district, that the per pupil cost is excessive, and that other satisfactory schools are accessible, he then determines that it is to the best interest of all concerned that the school be closed and the pupils transported to other schools outside the district.

Therefore, when school boards fail or refuse to cooperate or comply with the requirements, we think it is purely within the discretion of the State Superintendent of Schools to deny the equalization aid to the district. Assuming, for the sake of argument, that under Section 20 the State Superintendent exercises his discretion in the matter

and for the best interests of all concerned decides that the pupils shall be transported to an adjoining or other schools and the board in turn refuses when called upon to do so, to transport the pupils, then it is our opinion that he may deny such district state aid.

Referring to the Benton v. Windyville Consolidated School District decision, mentioned above, we quote in part the court's decision (l. c. 91):

> "Article Eleven (11) Chapter 57, Revised Statutes 1929, relating to the election, duties and term of office of the State Superintendent of Public Schools, provide among other things that he shall exercise supervision over the educational funds of the State, cause to be published as many copies of the law relating to schools with instructions for carrying them into execution as often as any change in such laws may be made, if in the opinion of the Superintendent it be of sufficient importance, and to in every way elevate the standard and efficiency of the instruction given in public schools and in connection with the other duties of the state superintendent, Section 9447 of said Article Eleven of Chapter (57), provides distinctly for the classification and accrediting of public schools by the state superintendent, and by the provisions of Section 9448, Revised Statutes 1929, the superintendent may drop any school from its classification, if he finds that such school does not maintain the required standard of excellence.

"Article Four (4), Chapter (57) of the 1929 Statutes of Missouri, relating to city, town and consolidated schools, their organization, duties of their officers and boards by Section (9345) of said Article (4) especially provides for the consolidation of three or more common school districts into one, for the purpose of maintaining both primary and high schools and further provides that 'Such organization and the government of such consolidated district shall be under and in compliance with the laws governing town and city school districts, as provided in Article (4)' of said chapter.

"Article Eleven of said Chapter (57) relating to the powers and duties of the state superintendent, including the classification of high schools and their work to be accredited is clearly within the scope of the facts in this case, and by the provisions of Sections 9447 and 9448, Revised Statutes 1929, the state superintendent clearly had the power, and for the purpose of providing more efficient educational opportunities it was his duty to propose and fix rules and regulations for the advancement thereof, certainly one of the most effective and beneficial of which is the progressive requirement relating to better qualifications of teachers.

"The directors of defendant district to the end that the school for which they had been elected as directors, would be enabled to keep step with the

> advancing trend of educational facilities and opportunities, chose to follow the regulations and directions of the state superintendent who certainly by reason of his official position and duty, must without evidence to the contrary, be presumed to know how best to plan, advise and promote the most advantageous opportunities for the preliminary education of the youth of our State.
>
> "In the letter from the respondent, School Board, replying to the appellant's application for a position as teacher, she was informed that her employment was 'on condition that the State will approve your work.'
>
> "The written record of the election of all teachers was on the same condition, 'That the state approve their credits.' The letter of the state superintendent to the board, concerning the qualifications of plaintiff and the greater educational opportunities which he, by reason of his duty as the state superintendent, sought to maintain, was evidence of a high conception of public service sought, by the superintendent, to be interposed, as provided by law, for the benefit of the youth of the State. To hold otherwise would be a decided backward step."

In view of the statutes and the decision quoted supra, we think that the State Superintendent of Schools, in exercising his discretion in determining the best interests

of all concerned, has the authority to demand, among other elements, that the teachers employed shall have sixty college hours credit. To hold otherwise would be a step backward in the rapid progress that is now being made in raising the standards of more than four thousand common school districts of the State with an average daily attendance of less than fifteen pupils.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

SOCIAL SECURITY: Money received from sale of containers must be placed in relief fund and must be appropriated.

May 1, 1940

5-3

FILED
38

Honorable George I. Haworth
Administrator
State Social Security Commission
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"Under Public Act No. 320, approved August 24, 1935, the Federal Surplus Commodities Corporation was empowered by Congress to purchase surplus agricultural commodities to be donated to the states for relief purposes. Commodities are allocated to the various state welfare agencies by the Corporation on the condition that the entire quantity will be distributed outside the normal channels of trade and commerce and in a manner which will prevent competition with the same or like commodities in commercial channels.

"Large quantities of surplus commodities have been donated to this State in the past. The containers in which the commodities are received, such as sacks, boxes, barrels, packing material, et cetera, are donated to the State by the Federal Surplus Commodities Corporation under the condition that if the containers are sold, the proceeds from such sale shall be used for relief purposes only.

"The Laws of Missouri, 1933, page 415, provide that all funds received

by a board or commission shall be deposited in the State Treasury and shall be subject to appropriation by the General Assembly. We have complied with this section of our laws and have deposited all funds derived from the sale of containers in the State Treasury. The Federal Surplus Commodities Corporation objects to this procedure on the ground that such money is not being used for relief purposes, but is being deposited in the general revenue fund of the State.

"Section 15, Article X, Constitution of Missouri, reads in part as follows:

"'All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General select.'

"Section 43, Article IV, Constitution of Missouri, reads in part as follows:

"'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.'

"Section 19, Article X, Constitution of Missouri, reads in part as follows:

"'No moneys shall ever be paid out of

the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor.'

QUESTION

"Do funds received from the sale of containers donated under the above conditions by the Federal Surplus Commodities Corporation become state funds and have to be deposited in the State Treasury, or can such funds be spent by this Commission for further relief purposes?

"Your attention is respectfully directed to Section 4 of the Social Security Law, which in part provides:

"'* * * to cooperate with the United States Government in matters of mutual concern pertaining to any duties wherein the State Commission is acting as a state agency, including the adoption of such methods of administration as are found by the United States Government to be necessary for the efficient operation of state plans hereunder; * * * '

"In an opinion from your department, dated January 7, 1937 and found in Appendix, House and Senate Journals, 59th General Assembly, Volume II, addressed to the Honorable Allen McReynolds, it was stated that certain moneys were not state funds because they were not intended by the Legislature to be such and that it was not necessary for such funds to be deposited in the State Treasury."

Section 20 of the Social Security Act, Laws of Missouri, 1937, page 476, provides as follows:

> "The State Treasurer shall be treasurer and custodian of all funds and moneys of the State Commission and shall issue checks upon such fund or funds in accordance with such rules and regulations as the State Commission shall prescribe. There is hereby established as a special fund, separate and apart from the public moneys of this state, the following:
>
> "(1) Old age assistance fund;
> (2) aid to dependent children fund;
> (3) relief fund;
> (4) child welfare service fund;
> (5) State Social Security Commission administration fund.
> * * * * * * * * * * * * * * * * *
> The relief fund shall consist of moneys appropriated by the state, and such moneys as may be received from the Federal Government or other sources for aid or relief in cases of public calamity. All expenditures for aid or relief in cases of public calamity shall be paid from this fund. * * * * * * "

It is clear from a reading of the above statute that moneys received from the Federal Government for relief should not go in to a general revenue fund but should go in to "a special fund separate and apart from the public moneys of this state." Such money is set aside in a trust fund of which the State Treasurer is the custodian. In view of the status of this fund, at the end of the biennium it does not lapse into the general revenue fund but remains "separate and apart" to be used only for relief. However, we call your attention to Article IV of Section 43 of the Constitution of Missouri, which provides in part as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

And Article X, Section 19 of the Constitution of Missouri which reads:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor."

Therefore, this money must be appropriated by the General Assembly and unless there is an appropriation to cover such funds, the same cannot be used. State ex rel. v. Gordon, 236 Mo. 142, l. c. 158.

CONCLUSION.

It is, therefore, the opinion of this department that moneys received from the sale of containers received from the Federal Government, the proceeds of which are to be used for relief purposes, must be placed in the relief fund in the state treasury. This relief fund is held by the State Treasurer in trust separate and apart and is not a part of the general revenue.

It is further the opinion of this department that this relief fund must be appropriated before it can be used.

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

AO'K:DA

LIQUOR: No authority given to compromise and settle liquor bonds. State must accept $2,000.00
BONDS: in the event of a violation, or nothing, if law is not violated.

May 11, 1940

6-17

FILED
38

Mr. Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Hassett:

We have received your recent letter, which reads as follows:

> "I have filed two suits on behalf of the State of Missouri against the principal and corporate sureties setting up a forfeiture of liquor bonds and asking that the penal sum of $2,000.00 in each instance be forfeited and paid over to the State for the benefit of the Henry County school fund.
>
> Will you please advise me as to the propriety of a settlement of a case of this nature for a sum less than the penal amount set forth."

We presume that you refer to the statutory liquor bonds required of dealers licensed to sell liquor by the drink. The Supreme Court of Missouri recently held that where the conditions of such a statutory liquor bond requiring the faithful performance of all duties imposed by law upon the licensee and the faithful performance of all the requirements of the Liquor Control Act are breached, the state may recover the full amount of the bond, without proof of actual damage. State vs. Wipke 133 S. W. (2nd) 354. In other words, the court there held that the bonds of dealers licensed to sell liquor by the drink are forfeiture rather than indemnity bonds. In the Wipke case, the court said, l.c. 357:

"The question which then arises is: Where the condition of such bond is breached, is it incumbent upon the State to prove actual damage, or is the State entitled to recover the full amount of the bond merely by showing a breach thereof? Stated otherwise, is the bond an indemnity bond or a forfeiture bond?

In 11 C.J.S., Bonds, Sec. 130, p. 510, we find: 'Where a statute requires the execution of a bond to the state, or to the United States, for a fixed penalty, conditioned for a compliance with the laws in the respects named therein, the penalty named in the bond is the measure of damages for its breach, or rather is a punishment inflicted by the sovereign for the violation of a pledge to observe its law, unless the statute under which the bond is given or the bond itself, read in the light of the statute, indicates a less or different measure.'

In the case of City of Paducah v. Jones, 126 Ky. 809, 104 S. W. 971, loc. cit. 975, the Court of Appeals of Kentucky said:

* *.

The question of the amount of damages caused by the violation of the law by the principal does not, and cannot, enter into the question. It is not contemplated that the recovery should be for any less sum than that fixed. It would be totally impracticable if not impossible in an action by the city on the bond to arrive at any measure of damage, except the amount stipulated. In an action upon a bond properly executed, the only legitimate subject of inquiry is whether or not the conditions of the bond have been broken. If it has, the sureties by the letter of their undertaking

agree that they will pay a certain sum. * * * * *.'

It is to be noted that Section 13a, in speaking of the bond, provides that 'any violation of such conditions, duties or requirements shall be a breach of said bond.' Of course, if the condition of a bond is breached, it necessarily follows that the obligee is entitled to be paid damages. In this case we think the damage recoverable is the face of the bond; it was required and given to secure performance by means of a forfeiture, and for that reason it is an aid to the State in enforcing its laws. We hold that a sale of whiskey by a licensee holding only a 5 per cent liquor license, as admitted by the stipulation, is a breach of the condition of the bond and that the State may recover the full amount thereof without proof of damages, for it would be impossible for the State to prove that it suffered any pecuniary damage by an illegal sale of whiskey to a liquor inspector.

The respondents tacitly admit that this is the law, provided the bond is only for the observance of the law, for in their brief they say: 'From a review of all of the authorities on the subject under consideration, including those relied upon by appellant in its brief, it may be concluded, we think, that if the bond is conditioned for the observance of some law of the sovereign, and nothing more, the measure of recovery for breach, unless the bond, or the statute under which it was given, indicates that a less, or different, measure was intended, is the full penalty of the bond, because it is regarded as the punishment fixed by the sovereign for the violation of law.'

> It follows from what we have said that the trial court erred in its ruling, * * * * * *."

A similar situation was involved in the case of Clement vs. Empire State Surety Company, 110 N.Y.S. 418. In that case, the court held that the State Commissioner of Excise was without authority to make an agreement with the surety on a statutory liquor bond, after its violation, by which the surety might relieve itself of liability by paying the penalties for violations of other such bonds upon which it was also surety; that neither the commissioner, nor the courts had any authority whatsoever to lessen the statutory penalty prescribed to secure an observance of the law; that the statute did not contemplate a reduction in the amount of the penalty in a liquor bond based upon doubtful liability or chances of success in maintaining an action for the breach, for if the conditions of the bond were broken, the amount of the recovery is fixed and absolute and if not, there is nothing due whatsoever. The court said, l.c. 422:

> "Furthermore, we are of the opinion that the State Commissioner of Excise was without authority to make such an agreement. No such authority is expressly conferred upon him by the liquor tax law, nor by any other statute to which our attention has been called or of which we are aware. If it exists at all, it must be by implication. The bond is to the people of the state of New York. The State Commissioner of Excise is the custodian of it. He is authorized to maintain an action in his name, as commissioner, to enforce the payment of the penalty for a breach of its conditions, and required to pay over the moneys collected to the State Treasurer. Liquor Tax Law, Sec. 18.

To that end he may employ counsel and attorneys to bring the action. Liquor Tax Law, Sec. 10. Having the power to maintain the action, the duty necessarily devolves upon him of determining whether sufficient grounds exist for such an action. That carries with it the authority of determining whether, after an action has been commenced, it shall be prosecuted or discontinued; but it gives him no right to change the conditions of the bond, since that is fixed by the express provisions of the statute. The primary object of the bond is to secure an observance of the law, and the penalty named is what the state exacts for a failure to comply with the conditions under which the right to traffic in liquor has been given. The amount thereof is fixed by statute, which neither the courts nor the State Commissioner of Excise may lessen. Lyman v. Berlmutter, 166 N. Y. 410-413, 60 N. E. 21. While the State Commissioner of Excise may determine at a given time whether sufficient grounds exist to warrant prosecuting an action upon the bond, that determination is not absolute, so as to bind either himself or his successor in office not to commence an action upon such a bond in the future. His duty in that respect is somewhat like that of the Attorney General in passing upon an application to bring an action to oust an alleged intruder from a public office, and it has been held that the determination of the Attorney General refusing to bring such an action is not binding upon his successor in office. People v. McClellan, 118 App. Div. 177, 103 N. Y. Supp. 146, affirmed in 188 N. Y. 618, 81 N. E. 1171. The State Commissioner of Excise must necessarily act upon the information which he then has. He may

> reach the conclusion therefrom that the evidence is insufficient to warrant bringing the action, when, in fact, the law has been violated, and, if he afterward discovers that fact and is satisfied that such violation can be established, it then becomes his duty to prosecute the action for a breach of the conditions of the bond, and recover the penalty therefor. The statute does not contemplate a reduction in the amount of the penalty, based upon doubtful liability or chances of success in maintaining the action. If the conditions of the bond have been broken, the amount of the recovery is fixed and absolute. If not, there is nothing due. In no view of the case, did the defendant make out a defense, and the verdict should have been directed for the plaintiff."

As in the above case, no authority is expressly conferred upon anyone to compromise and settle the liability or supposed liability on a statutory liquor bond for an amount less than the face value thereof, that is, $2,000.00. If such a right exists at all, it must be by implication. The bond runs to the State of Missouri. In the Wipke case, supra, the Supreme Court held that the State of Missouri is authorized to maintain an action to enforce the payment of the penalty for a breach of its conditions. Since the state can maintain the action, the duty necessarily devolves upon the sta e to determine whether sufficient grounds exist for such an action. The state undoubtedly has the right to determine whether or not any particular action should be commenced or, if an action has been commenced, whether it should be prosecuted or discontinued. However, the state apparently has "no right to change the conditions of the bond, since that is fixed by the express provisions of the statute," As in the New York case, the primary object of the bonds of dealers licensed to sell liquor by the drink in Missouri "is to secure an observance of the law, and the penalty named is what the state exacts for a failure to comply with the conditions under which the right to traffic in liquor has been given."

The Wipke case held that such is the purpose of the

bonds. The New York court then said that "the amount thereof is fixed by statute which neither the courts nor the state commissioner of excise may lessen." The New York court then went on to say that "the statute does not contemplate a reduction in the amount of the penalty, based upon doubtful liability or chances of success in maintaining the action. If the conditions of the bond have been broken, the amount of the recovery is fixed and absolute. If not, there is nothing due."

We think the same is true in connection with our own statutes and statutory bonds issued pursuant thereto. Neither the statutes nor the bonds appear in any way to contemplate a reduction in the amount of the penalty under any circumstances, whether based upon doubtful liability, chances of success, or otherwise. If the conditions of the bond are broken, the amount to be recovered is $2,000.00. If the conditions of the bond have not been broken, then there is nothing due. It is either $2,000.00 or nothing.

There are a number of cases holding that when a right is given to a state or a political subdivision to maintain an action, that any such power to sue implies and carries with it the right to compromise and settle the litigation for an amount less than that sued for or demanded. Several cases hold that the attorney general of the state has the power to compromise litigation since it is a part of the authority given him to conduct the same. However, every case announcing this doctrine deals with the collection of taxes, including the question of validity and amount of the assessments, and also other types of demands which were not liquidated or the amount fixed by law. However, we have found no case which announces a rule contrary to that given in Clements vs. Empire State Surety Company, supra, wherein the amount due and owing as a forfeiture under certain conditions is definitely fixed by statute.

CONCLUSION

We conclude, therefore, that no power is given authorizing the State of Missouri, or any of its political subdivisions

to compromise or settle the liability of the statutory bond required of dealers selling liquor by the drink for an amount less than the penal sum thereof, that is, $2,000.00. The law does not contemplate a reduction in the amount of the penalty based upon doubtful liability or chances of success in maintaining the action. If the conditions of the bond have been broken, the amount of the recovery is fixed and absolute. If not, there is nothing due. The state undoubtedly has the authority to determine whether or not a given action should be commenced, or if an action has been commenced, whether it should be prosecuted or discontinued. However, it does not have the right to change the conditions of the bond as to the amount since that is fixed by the express provisions of the statute. It appears, therefore, that neither the courts nor any officer of the state may accept in settlement an amount less than the full penalty of the bond.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:RT

ELECTIONS: Challengers and watchers in City of St. Louis must be appointed by Chairman or presiding officer of the chief managing committee of each political party having representation on the Board of Election Commissioners.

June 25, 1940

FILED
38



Honorable Charles M. Hay
Chairman, Board of Election Commissioners
208 South 12th Blvd.
St. Louis, Missouri

Dear Sir:

We have received your letter of June 12th, which reads as follows:

> "Section 43 of the Permanent Registration Law applicable to the City of St. Louis provides that challengers and watchers shall be designated and certified by 'the recognized chairman or presiding officer of the chief managing committee of a party in any such city.' Section 10270 of the law applicable to primary elections provides that the challengers and watchers shall be appointed by the Ward Committeemen in any city with a population of over 300,000.
>
> Heretofore, the practice has been to recognize the Chairman of the City Committee as the proper person to appoint watchers and challengers.
>
> Because of the ruling of the Supreme Court in the case involving the destruction of the ballots cast in an election in this city, to the effect that the general law applicable to the whole state superseded the law applicable to the city alone, although the latter was

> enacted subsequent to the former, the question has been raised with respect to the right of the Chairman of the Committee to make the appointments and the suggestion made that perhaps the appointments should be made by the Ward Committeemen in a primary election.
>
> We will greatly appreciate it if you would let us have your opinion on this proposition at your very earliest convenience."

As you have stated, Section 10270, R. S. Mo. 1929, which is contained in the general laws dealing with primary elections, provides as follows:

> "The county, ward or township committeeman of each party in each county, or the ward committeeman in any city with a population of over 300,000, may appoint two party agents or representatives, with alternates for each, who may represent his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall act as challengers and witnesses to the count of the vote for their respective parties, and have the power prescribed by law."

You have also called our attention to Section 43 of the permanent registration laws applicable to all cities of 600,000 or more inhabitants. This particular act, of course, applies only to the City of St. Louis, and is found in Laws of Mo. 1937, page 235 to 278, inclusive. Section 43, as passed by the legislature in 1937, reads as follows:

> "At every registration and election,

each one of the political parties, having representation on the Board, shall have the right to designate and keep a challenger at each place of registration, revision, of registration and voting who shall be assigned such position immediately adjoining the judges of election inside the polling or registration booth, as will enable him to see each person as he offers to register or vote, and who shall be protected in the discharge of his duty by the judges of election and the police. And authority signed by the recognized chairman or presiding officer of the chief managing committee of a party in any such city, shall be sufficient evidence of the right of the challenger for such party to be present inside the registration or polling place. But in case any challenger does not or cannot produce the authority of such chairman, it shall be the duty of such judges of election to recognize a challenger that shall be vouched for and presented to them by the persons present belonging to such political party, or who shall be vouched for by the judge representing such party. The chairman of the managing committee of such political party for such city may remove any challenger appointed by him, and substitute another in his place. The challenger so appointed and admitted to the room where such ballot box is kept shall have the right and privilege of remaining during the canvass of the votes, and until the returns are duly signed and made. Each political party shall also have the right to a challenger placed conveniently outside of the polling booth, but not in the way of the voters. In addition to such challengers, each of the political parties having representation on the Board, at the close of the polls shall have the right to the admission of two persons of their political faith into the room where such ballots

> are to be canvassed, to watch such canvass, which watchers may be selected as above prescribed in case of challengers; and in the absence of such selection, it shall be the duty of the judges of such election to admit into such room two persons of such political party, and who shall be vouched for by the judge or judges representing such political party, to be present during the canvass of such votes and the making of such returns; that such persons shall be of good character and sober, and shall in no wise interfere with such canvass. The police shall in no manner interfere with the entrance of such watchers into such room, but they shall keep order; and in case of any disorderly conduct on the part of any bystanders or watchers, it shall be the duty of the police, upon request of the judges, to exclude such persons from such room, and upon such watcher or watchers being excluded from such room, the judge or judges representing the same political party as the rejected watcher may select other watchers in their stead."

We have quoted both of the above statutes in full in order to show that Section 10270 contained in the 1929 Revised Statutes deals with the subject of the appointment of challengers and watchers in general and comprehensive terms, while Section 43 of the 1937 Act applicable only to the City of St. Louis deals with the same subject in a more minute and definite way. In this connection, the Supreme Court of Missouri en banc, in the recent case of State ex rel City of Springfield vs. Smith, 125 S.W. (2d) 883, l.c. 885, said:

> "It is familiar doctrine that when there is one statute dealing with a subject in general and comprehensive terms

> and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of the prior general one; * * * *."

Consequently, since the special act dealing only with St. Louis is also the last act passed on the subject, it is to be regarded as an exception to or qualification of the prior general act and the terms of the special act are in force and effect. This means that the "recognized chairman or presiding officer of the chief managing committee" has the right to appoint such challengers and watchers and to assign the authority which must be recognized at the polls. Incidentally, the procedure outlined in Section 43 is applicable to primary, as well as general, elections. Section 43, supra, states that "at every registration and election" each of the political parties, through the recognized chairman of the chief managing committee shall have the right to designate and appoint challengers. Subsection (d) of Section 2 of the same act, Laws of Missouri 1937, page 237, defines the word "election" as it is used in the entire act. Subsection (d) reads as follows:

> "(d) 'Election' shall mean any general, special, municipal and primary election unless otherwise specified, and shall include a submission to a vote of the people of any amendment, law or other public act, or proposition."

Your particular concern seems to be the effect, if any, of a recent ruling of the Supreme Court involving the

destruction of ballots in which the general law applicable to the whole state was held to be in full force and effect rather than the special act applicable only to the City of St. Louis. The case you refer to is State ex rel Miller, Circuit Attorney, vs. O'Malley, Judge, 117 S. W. (2nd) 319. In that case, the Supreme Court en banc did not hold that a prior general statute was in full force and effect as against a later and valid special statute. The Court held that the later and special statute was unconstitutional and void and for that reason the general statute was applicable. There remained no valid special act covering the matter. The Court said, l.c. 326:

> "Since section 10619 (the special statute) is unconstitutional in so far as it purports to authorize the preservation and use of the ballots as evidence in grand jury investigations of election frauds until the final determination thereof, it follows that section 10315 is the statute applicable to this case. Whether the former be considered merely an exception to the latter, or whether (as relator contends in one part of his brief) it was to the extent mentioned a repealing statute because special and enacted later, in either event section 10315 in the general election law still stands and governs the proceedings below. The law on this point is stated in a headnote to Copeland v. City of St. Joseph, 126 Mo. 417, 29 S. W. 281, which accurately reflects the holding in the opinion: 'Although an act, by its terms, repeals all parts of former acts inconsistent with, or repugnant to, its provisions, yet it will not repeal a section of the former act corresponding in substance with a section of the new act, where the latter section is unconstitutional.'"

Consequently, it seems apparent that the Supreme Court had no thought in the above case of attempting to overturn

the well established rule that a later enacted special act covering the same subject matter as a prior general act would be regarded as an exception to or qualification of the prior general act, and that the special act under such circumstances would control.

CONCLUSION

Section 43 of the permanent registration law applicable to the City of St. Louis (Laws of Missouri 1937, page 261) is the applicable statute pertaining to the appointment of challengers and watchers in elections in the City of St. Louis. This section provides that the "recognized chairman or presiding officer of the chief managing committee" of a political party having representation on the board shall appoint challengers and watchers and shall furnish each of the persons so appointed with written authority properly signed. Section 10270 R. S. Mo. 1929, being a general section dealing with the appointment of watchers and challengers, over the entire state, is therefore not applicable to the City of St. Louis because of the later enacted special statute.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
JFA:RT

COUNTIES:
FEDERAL SURPLUS COMMODITIES CORPORATION:
APPROPRIATION OF PUBLIC MONEYS FOR:

County Courts may appropriate public funds to Surplus Commodities Corporation to carry out the purpose for which that corporation was formed, provided, the funds are available and not in conflict with the provision of the County Budget Law.

September 26, 1940

9-28

FILED
38

Hon. Frank W. Hayes
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not county courts may appropriate public funds to the Federal Surplus Commodities Corporation.

In connection with this request you submitted your proposition in three questions, namely:

> "(1) Would it be legal for Pettis County to borrow money in anticipation of the collection of taxes for the current fiscal year for the purpose of financing this revolving fund?
>
> "(2) Would it be legal for Pettis County to use balances in road funds or bond funds to finance a revolving fund.
>
> "(3) Even if the money were available, would it be legal for Pettis County to make an unsecured loan to an agency for the purpose of financing this revolving fund."

In your letter you indicate that you are under the impression that this department has rendered an opinion to Greene County, Missouri, on this question.

You are in error as to that. We have rendered an opinion to Mr. E. A. Barbour, Jr, of Springfield, Missouri, in reference to the city of Springfield, on this question, and we are enclosing a copy of this opinion for your information. This opinion was dated August 15, 1940.

You will note in this opinion that this department has ruled that the city of Springfield, by virtue of the provisions of the Constitution and the statutes applicable to such cities, is authorized to make such an appropriation. In support of that opinion we have cited the Jasper County Farm Bureau case, 286 S. W. 381, and the City of St. Louis case, 58 S. W. (2d) 979.

In the City of St. Louis case you will note that the court held that an ordinance authorizing the issuance of bonds to provide relief for the people of the city, who were unable to take care of themselves, and to relieve them of their condition, was an appropriation for a public purpose and within the provisions of the Constitution. In the St. Louis case the court referred to different sections of the statutes which authorized counties to expend money for the poor and needy. On page 9 of the copy of the opinion which we are enclosing you will find these different sections set out and we do not deem it necessary to restate them here.

The purposes of the Surplus Commodities Corporation are similar to those of any other agency for relief. At page 11 of the copy of the opinion which we enclose we also cite the case of State ex rel. Seibert, 123 Mo. 424, as authority for the proposition that the Surplus Commodities Corporation may act as agent for the county in disbursing these moneys.

Therefore, following the authorities set out in the Barbour opinion, supra, it is the opinion of this department that the County Court of Pettis County would be authorized to furnish public funds to the Surplus Commodities Corporation to carry out the purposes for which that corporation was formed, which is in aid and for the relief of the poor and needy.

Answering your questions in the order in which they are submitted: "(1) Would it be legal for Pettis County to borrow money in anticipation of the collection of taxes

for the current fiscal year for the purpose of financing this revolving fund?", will say that the statutes are a warrant of authority to the County Court. Wolcott v. Lawrence County, 26 Mo. 272. Therefore, on the question of whether or not that County could borrow money in anticipation of the collection of taxes for the current fiscal year for the aforesaid purpose, we must look to the statutes for that authority.

Sections 1 to 8 of the County Budget Act, which was passed in 1933 (Laws of Missouri 1933, page 340), apply to counties of the class to which Pettis County belongs (that is, 50,000 inhabitants or less). From the reading of the aforesaid sections of said Act it is very clear that the lawmakers intended to place counties on a strictly cash basis.

Section 17 of the Act, Laws of Missouri 1933, page 349 (amended Laws of Missouri 1939, page 660), authorizes county courts to borrow money in anticipation of the collection of taxes for the current fiscal year. However, that section does not apply to counties in the class to which Pettis County belongs, and, therefore, since the counties of 50,000 inhabitants or less inhabitants have been left out of that class, then there is no doubt but that the lawmakers intended to prohibit such counties from borrowing money in anticipation of the collection of taxes for the fiscal year. In other words, the counties of 50,000 or less are not authorized to borrow money in anticipation of collection of taxes for the current fiscal year for the purpose of financing the revolving fund or the fund to be used for the purpose of financing the Surplus Commodities Corporation.

Answering your second question: "(2) Would it be legal for Pettis County to use balances in road funds or bond funds to finance a revolving fund?", we think that the road fund whether raised by virtue of the provisions of Section 7890 or 7891, or bond funds, would come within the classification of special funds raised for those purposes. In connection with the question of the authority of the County Court to transfer funds, we find that the only time the County Court is authorized to do this is provided for by Section 12167, R. S. Mo. 1929. This section provides as follows:

> "Whenever there is a balance in any county treasury in this state to the

> credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

By virtue of the provisions of this section, and since the purposes for which your road funds were raised are still in existence, and this money will be needed for that purpose, then it is the opinion of this department that you would not be authorized to transfer your road funds for the purpose of financing this revolving fund. If you have bond funds on hand and these bonds have been paid off in full, then the County Court, under the provisions of the foregoing section, would be authorized to transfer those funds to your general revenue fund. However, under the Budget Act, and since the expenditures for this revolving fund was apparently not anticipated in your budget for 1940, then these funds, even if transferred, could not be put into the revolving fund until the expenditures in the first four classes of Section 5 of the Budget Act had been met or the County Court was reasonably certain that sufficient funds were on hand to meet such expenditures.

Answering your third question: "(3) Even if the money were available, would it be legal for Pettis County to make an unsecured loan to an agency for the purpose of financing this revolving fund?", as stated in the opinion which we are enclosing, this appropriation to the Surplus Commodities Corporation is in the nature of an appropriation for the relief and aid of the poor and needy people. Strictly speaking, it is not a loan such as is referred to and prohibited by the Constitution and statutes.

Article IV, Section 47, of the Constitution prohibits the loan or grant of public money to individuals, associations or corporations, etc., but, as stated in the opinion, and authorities therein cited, this money is expended for a public charity and does not violate the provisions of the Constitution.

It will be noted in the City of St. Louis case, cited in the copy of the opinion enclosed, that the city of St. Louis issued bonds for relief purposes, and, therefore, if the County has the funds available for the aforesaid purposes, or if the limitations on the amount of the levy would not authorize a levy sufficient to raise these funds, then, under the St. Louis procedure the funds might be raised by a bond issue authorized by a vote of the people.

CONCLUSION.

Therefore, under the authorities cited in the copy of the Springfield opinion herewith enclosed, it is the opinion of this department that if moneys are available a County may make an unsecured loan or grant of money to the Surplus Commodities Corporation for the purpose of financing the revolving fund used by that corporation in carrying out the purposes for which it was formed, that is for the purpose of encouraging the domestic consumption of certain commodities and by increasing their utilization through benefits and indemnities, donations or other means, among persons in low income groups.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

COUNTY CLERK: Appointee to fill vacancy serves until general election only.

November 12, 1940 11/20

FILED 38

Honorable James P. Hawkins
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Sir:

This will acknowledge receipt of your letter of October 25, 1940, in which you ask for an opinion as follows:

> "Please give me your opinion on the following matter: We will elect on November 5, 1940," a county clerk of this county to fill an unexpired term due to the death of the clerk elected in 1938. "When will the person elected take office? There seems to be two views on it, one group says January 1940 while the other says as soon as the official count is made."

The question requires a consideration of two sections of the statute. Section 10216 R. S. 1929, a general section authorizing the governor to fill vacancies, is as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having

> duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

Section 11665, which is a special section applying to clerks of courts of record except the Clerk of the Supreme Court and the St. Louis Court of Appeals, reads as follows:

> "When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

It will be observed that the general section providing that the appointee shall serves until the first Monday in January next following the first ensuing general election, and a special section provides that the appointee shall serve until the next election, which seems to be a conflict in the provisions of these two statutes. In the case of State

ex inf. W. W. Major vs. W. K. Amick 247 Mo. 271, the Supreme Court had before it for construction Section 5828, R. S. 1909, which was the same as Section 10216, R. S. 1929, and Section 3896, R. S. 1909, a special section applying to the vacancy existing in the office of the circuit judge of Buchanan County which contains the same provision relating to the appointee holding office until the next general election as is found in Section 11665. In discussing the matter, the Supreme Court of Missouri, at l. c. 289, and following, said:

> "If these two statutes are consistent and can stand together, then it is the duty of the court to harmonize rather than to hunt for conflict of statutory provisions in pari materia.
>
> In discussing this canon of statutory construction, the Supreme Court of the United States, in the case of Frost v. Wenie, 157 U. S. 58, used this language; ' It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court--no purpose to repeal being clearly expressed or indicated-is, if possible, to give effect to both. In other words, it must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.'
>
> And in the case of State ex rel. v. Patterson, 207 Mo. l. c. 144, this court used the following language: 'All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. (Sutherland, Statutory Construction, sec. 283.) And 'a statute must be construed with

reference to the system of which it forms a part. And statutes on cognate subjects may be referred to, though not strictly in pari materia.' (Id., sec. 284)'

In the case of Humphries v. Davis, 100 Ind. l.c. 284, the Supreme Court of Indiana, speaking through Elliott, J., said: 'A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. (Citing authorities). . . 'Construction has ever been a potent agency in harmonizing the operation of statutes with equity and justice.' Statutes are to be so construed as to make the law one uniform system, not a collection of divers and disjointed fragments. When this principle of construction is adopted, 'an actment of to-day has the benefit of judicial renderings extending back through centuries of past legislation.' (Bishop, Written Laws, sec. 242b.) 'A statute,' says the author just referred to, 'must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble.' 'The completed doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting and extending one another into one system of jurisprudence as nearly harmonious and rounded as it can be made without violating unyielding written and unwritten terms.' (Bishop,

Written Laws, secs. 113a, 86)'

If we observ and give force and effect to the foregoing rules of construction in interpreting sections 3896 and 5828, then we must read them together-that is, read the one into the other as one enactment. (State ex rel. v. Patterson, supra, l.c. 148)

And by so doing sections 5828 and 3896 would read substantially as follows: Whenever any vacancy shall occur in any state or county office other than the office of Lieutenant-Governor, State Senator, Representative, sheriff or coroner, such vacancy shall be filled by appointment by the Governor; and the person so appointed shall continue in office until the first Monday in January next following the first general elcttion: Provided, that if the office of the judge of any court of record in this State shall become vacant, such vacancy shall be filled by appointment of the Governor until the next general election held after such vacancy occurs, when the same shall be filled by election for the residue of the unexpired term.

By so reading and construing those two sections together, we eliminate all seeming conflict that exists between them and harmonize all the laws of the State regarding vacancies in state and county offices and the mode of filling same, and at the same time give full force and effect to the plain and clear meaning of the Legislature as expressed in the two sections, which is always the main object to be obta ned in construing any statute.

Laws should be so construed as to give their intent paramount effect.

There is another rule of statutory construction, which, if followed in the interpretation of these two sections of the statute, the conclusions reached would be the same as before stated. That rule is stated in the case of Ruschenberg v. Railroad, 161 Mo. 70, in substantially the following language:

Where ther are two acts and the provisions of one

> apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act, and not a repeal of the former, and especially is this true when such general and special acts are contemporaneous."

And, again at l.c. 294, the Supreme Court said:

> "We are clearly of the opinion that upon both principle and authority respondent's term of office expired on the day following the general election held on November 5, 1912."

Section 11666 requires giving of bond by clerks of the courts of record, and Section 11669 directs the issuance of a certificate of election and the taking and filing of an oath of office.

CONCLUSION

It is the opinion of this department that the term of office of the appointee terminated upon the election of a person to fill the vacancy at the general election held on November 5, 1940; that the person so elected should take over the duties of the office immediately on qualifying by taking the prescribed oath and filing the required bond.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

Covell R. Hewitt
(Acting) Attorney General

ELEEMOSYNARY INSTITUTIONS: Method of payment to State Hospitals for support of patients committed as habitual drunkards or drug addicts.

January 3, 1940

1-6

FILED
39

Hon. Sam Hess
Judge of Probate Court
Phelps County
Rolla, Missouri

Dear Judge Hess:

We are in receipt of your request for an opinion, under date of November 10, 1939, which reads as follows:

> "Proceeding under ARTICLE 19, Sections 508-516, R.S. 1929, with notice as in Section 511, Estella Robinson, a female single person, resident of Rolla, Phelps County, Missouri, was adjudged to be a drug addict, on the 30th day of October, 1939, and on the 7th day of November, 1939, a commitment was issued as provided in Section 512, placed in the hands of the Sheriff and he took her to Farmington on the morning of the 8th, the Judge first having telephoned to see if they could take her.
>
> "The County Court happened to be in session, so the Sheriff took with a check for payment in advance, but I told him not to give it to them unless they refused to take her otherwise. They refused and he gave them the check.

"The question is: can a State Hospital, admitting that they have room, be compelled to receive a drug addict for treatment without payment in advance?

"Section 8631 provides for payment in advance for private patients, and Section 8636 provides payment in advance for County patients of a certain type; but Sections 508-516 do not seem to contemplate nor do they provide that payment should be in advance.

"The above question becomes of importance when the County Court is not in session at a time when the Probate Court commits a drug addict. It seems to me that the Hospital must take the patient and get their money as provided in Section 513."

Section 513 R. S. Missouri, 1929, providing for payment to the state hospital for the support of persons committed as habitual drunkards or drug addicts, reads as follows:

"Such hospital shall collect, from the county of such patient's residence, by warrant of the superintendent of the hospital drawn on the county court, the same expense for the support of such patient as is allowed by law for the support of insane patients; and all fees of the probate court and fees and mileage of the sheriff shall be the same as in like proceedings in the inquisition and care of insane patients, and shall also be paid out of the county treasury by order of the county court; but all such expenses, fees and mileage shall be a charge upon any estate of the patient

> subject to appropriation as hereinabove provided, and for the payment of which by the curator into the county treasury, said probate may and shall, from time to time upon application of the county court, make order for the sale and transfer of title of such estate as in case of estates of insane persons under guardianship, and for payment into such county treasury."

Section 8631 R. S. Missouri, 1929, makes provision for payment to the state hospital for persons committed as pay patients, and reads as follows:

> "Preparatory to the admission of such a patient, the superintendent shall be furnished with a request of the form seen in section 8632 under the hand of the person by whose direction he is sent, stating his age, and place of nativity, if known, his christian and surname, place of residence, occupation and degree of relationship, or other circumstances of connection between him and the person requesting his admission; and, second, a certificate of the form seen in section 8633, dated within two months, under oath, signed by two physicians, of the fact of his being insane. Each person signing such request or certificate shall annex to his name his profession or occupation, and the township, county and state of his residence, unless these appear on the face of the document. Before any private patient shall be received into the hospital, there shall be produced to the superintendent a receipt from the treasurer of the hospital, ac-

> knowledging the payment to him of at least thirty days' charges in advance, and a sufficient bond to said treasurer, conditioned that the obligor or obligors will secure the payment of charges incurred in behalf and on account of said patient; said bond, with satisfactory securities, shall be of the form and contain the provisions as provided in section 8634. No part of said thirty days' payment shall be refunded if the patient making such payment shall be taken away within that period uncured and against the consent of the superintendent.

Section 8636 R. S. Missouri, 1929, makes provision for payment to the state hospital for persons committed as insane poor, and reads as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding eighteen dollars ($18.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose or raising the sum of money so provided for, the several county courts shall be

> and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for. And state hospitals are hereby expressly prohibited from receiving any county warrant in payment of any such sum as may be due by this section."

In 1935, Section 8636 R. S. Missouri, 1929, supra, was repealed and a new section was enacted in lieu thereof. That section is found in Laws of Missouri, page 388, (1935) and reads as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

We see, from the foregoing sections, that our Legislature has seen fit to make three separate provisions for method of payment to state institutions for support of insane patients. The question of which of the three is applicable to a given situation clearly depends on the particular type of patient which is admitted to the institution. Section 515 R. S. Missouri, 1929, requires the superintendents to accept all persons ordered confined by the probate court and reads thus:

> "The superintendents of all state hospitals are hereby required to receive for such confinement and treatment in such institutions all such persons as may be lawfully ordered to be confined therein pursuant to the provisions of this law, to the extent of the capacity of such institutions to properly accomodate and care for such patients, which condition shall be ascertained by the probate judge by inquiry of the superintendent before making the order of confinement."

As we understand your given set of facts, the person you mention in your request is a drug addict, and that being the case, the applicable sections of our statutes are Sections 513 and 515 R. S. Missouri, 1929, supra. Neither of those sections has been repealed and both are therefore still in effect.

CONCLUSION

It follows from the above that the opinion of this Department is that in the case of a drug addict, the applicable section providing for method of payment for support is Section 513 R. S. Missouri, 1929. Failure to comply with Section 8636, Laws of Missouri, 1935, page 388, can have no bearing on the matter, as that section is applicable to an entirely different

type of patient. It is not within the province of the superintendent of a State hospital to demand compliance with Section 8636 as a prerequisite to admission of a drug addict. The Legislature has decided that the method of payment in a case such as yours shall be as provided in Section 513 R. S. Missouri, 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

STATE CANCER HOSPITAL:) No specified length of time required
) to establish a new residence. Where
RESIDENCE:) new residence established by patient,
) must be recertified and county of
) patient's new residence becomes liable
) for future support.

November 27, 1940



Miss Dorothy Hehmann
Executive Director
State Cancer Commission
3713 Washington Blvd.,
St. Louis, Missouri

Dear Miss Hehmann:

We are in receipt of your letter of November 13th, wherein you state as follows:

> "As you know, according to State law, the county of residence of a patient must certify the individual into The Ellis Fischel State Cancer Hospital, thus becoming liable for a fee of no more than $5.00 per month for the time the individual is in the hospital. Arrangements for such original certification and payment of fees has been worked out in a very satisfactory manner. However, as you know, we are dealing with only indigent citizens of the State of Missouri. Quite a number of these are elderly people, completely without funds, and spend a portion of their time with one relative, then move to live with another in a different county of the state. Also, many of these patients must be readmitted to the hospital for further treatment after a period of time has elapsed, sometimes as much as six months or a year. Occasionally we find that in the interim between the first and second admissions the

patient has moved from one county to another. The problem now arises: Must that patient be recertified by the second county and, if so, how long must the patient live in the county before such recertification is necessary? At one time we received an opinion from your office to the effect that residency in the State of Missouri is interpreted on the basis of intent to stay. We know for voting privileges an individual must reside in a county at least 60 days before he is permitted to vote. Does this mean that an individual must reside in a county 60 days before that county is responsible for him, provided he is indigent? In other words, what we are trying to learn is

1- Whether a patient must live in a county more than two months before he needs to be recertified for admission to the hospital.

2- If this (1) is true, and the patient is admitted during this two month period, which county do we bill, the original county that certified the patient or the county in which the patient is residing at a given time?

"We would appreciate having an opinion from you in regard to this."

The Fifty-ninth General Assembly (Laws of Missouri, 1937) created the State Cancer Hospital. Section 7, page 496, of said Act, provides for the treatment of "indigent persons," "unable financially" to secure care and treatment for cancer:

"The State Cancer Hospital shall be primarily and principally designed for the care and treatment of indigent persons afflicted with cancer, such scientific research as will promote the welfare of indigent patients committed to its care and for the care of legal residents of Missouri only. Where such patient is unable financially to secure such care or, in the case of a minor, where the parent, guardian, trustee or other person having lawful custody of such minor's person, as the case may be, is unable financially to secure such care the State Cancer Hospital is hereby designated as a place of treatment for such persons."

Section 8, page 497, of said Act, provides as follows:

"Whenever the existence of a case described in Section 7 of this Act shall come to the notice of the sheriff, health officer, public health nurse, peace officer, or any other public officer, or any physician or surgeon, it shall be his duty to, and any other person may, file with the Judges of the County Court of the county of the legal residence of such person, or if such person be a resident of the City of St. Louis, then with the corresponding authority of said City, and application for the treatment of such person at the State Cancer Hospital. Such application shall be made on blanks to be furnished by the State Cancer Hospital and shall contain a full statement of the financial situation of the person sought to be treated and a general statement of his physical condition.

Upon the filing of such application, the Judges of the County Court shall make investigation in such manner as they shall deem advisable, and it shall be the duty of any public official of any county, city, town, village or ward of the residence of the person to be treated to supply the Judges of the County Court on request thereof all information within their knowledge relative to the financial situation of the person sought to be treated, If, after such investigation, said Judges of the County Court shall be satisfied that the person on whose behalf the application is made is not financially able to provide himself with such treatment, or in case of a minor, that his parent, guardian or trustee, or the person having legal custody over him or legally responsible for his support or maintenance is not financially able to provide such treatment, then said Judges shall appoint a physician of said County whose duty it shall be to personally make an examination of the person on whose behalf said application for treatment has been filed. Said Physician shall thereupon make and file with the Judges of the County Court a report in writing, setting forth the nature and history of the case, and such other information as will be likely to aid in the medical or surgical treatment, especially tumors and diseases of a cancerous nature, affecting said person and shall also state in said report whether or not, in his opinion, the condition of such person can probably be alleviated. The report of said physician shall be made within such time as the court may direct, and upon blanks, to be furnished by the administrator of the

State Cancer Hospital for that purpose. Said report shall include any information within the knowledge of said physician relative to the financial condition of the person proposed to be treated. The physician appointed to make said examination unless he is already a salaried officer of the State or some political subdivision thereof or municipal corporation therein thereof shall receive the sum of Five Dollars ($5.00) for making said examination and in any case shall receive his actual and necessary expenses; which fee and expenses shall be paid by the county of residence of the patient; and it shall be the duty of the county court of such county to provide for such payment. If, upon filing said report, the Judges of the County Court shall be satisfied that the patient is one who should be treated at the State Cancer Hospital and that the person to be treated, or his parent, guardian, trustee or other person having legal custody of his person in case of a minor, is not financially able to provide such person with proper treatment, the Judges of the County Court shall enter an order finding such facts. In case the Court is not satisfied they may take additional testimony or make such further investigation as to them shall seem proper. Upon the entry of the order of the Judges of the County Court, approving said application, they shall communicate with the Administrator of the State Cancer Hospital and ascertain whether or not the applicant can be received as a patient. If the State Cancer Hospital can receive such

> applicant, the court shall thereupon certify their approval of such application to said hospital. In cases coming to the attention of the County Judges where proper and timely diagnosis may not be had locally, authority is hereby given to said Judges to make proper and necessary orders sending the patient to State Cancer Hospital for examination; the necessary expense incident thereto to be chargeable to the county of residence of the patient. A copy of each application and a copy of the report of the physician and court order in each case shall be sent to the Administrator of said hospital."

The application for care and treatment must be made with the "judges of the county court of the county of the legal residence of such person," who, if satisfied that the person is "not financially able to provide himself with such treatment," appoint a physician to make an examination. The cost of the examination is paid by the "county of residence of the patient," and if the judges of the county court are satisfied that the person needs treatment they may enter an order finding such facts.

Section 9, page 498, of said Act, provides which county shall be charged with the cost of the patient:

> "The State Cancer Hospital shall not make any charge directly to a patient admitted on certificate of the Judges of the County Court as heretofore outlined, but shall make a charge against the county from which said patient is sent only for the necessary maintenance and supplies used for the benefit of said patient."

Section 11, page 498, 499, of said Act, provides for the sending of monthly statements of amounts owed by the county court for said patients:

> "The Administrator shall, under the direction of the Cancer Commission of the State of Missouri, cause, monthly, to be made out and forwarded to any county court which may send to the State Cancer Hospital a patient as described in this Act, an exact amount of the sum due and owing by such county court on account of such patient. Said county court, at its first session thereafter, shall proceed to allow and cause to be paid over to the Treasurer of the State of Missouri the amount of said account."

Section 14, page 500, of said Act, provides the amount to be paid by the several counties for each patient sent to the hospital:

> "The several counties and the City of St. Louis sending indigent patients to the cancer hospital shall pay semi-annually such sums as the State Cancer Commission deem necessary not exceeding Five Dollars ($5.00) per month per patient; and, in addition thereto the actual cost of their clothing and the expense of their removal to and from the hospital, and if they shall die therein, for burial expenses an amount not to exceed $50.00; and, in case such indigent person shall die or be removed from the hospital before the expiration of six months, the cancer commission shall refund or cause to be refunded the amount due to the county entitled to the same."

We have a large number of statutes in our State defining what constitutes "residence." In determining who is an "inhabitant" within the meaning of our poor laws, Section 12952, R. S. Mo. 1929, provides that:

> "No person shall be deemed an inhabitant within the meaning of this article, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such poor person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

The above section might throw some light on the period of time deemed by the Legislature necessary to acquire residence in a county. However, the above section refers to a "poor person," whereas, Section 7, supra, refers to "indigent persons." There is a distinction between a poor person and an indigent person seeking to avail himself of hospital facilities.

This distinction is recognized in the case of Goodall v. Brite, 54 P. (2d) (Cal.), 510, l. c. 514, 515:

> "In the second phase of the case we have the problem of the care of the health and the promotion of the general welfare of what we may term the deserving needy, but not the pauper class of the county. This class must be hospitalized at the county hospital or permitted to suffer without proper care. It is common knowledge that this class composes a considerable proportion of the body of the citizenship of any county. As a rule those composing it are honest, industrious, and often thrifty people whose welfare should be of first concern to any governmental agency. It is admitted that a resident pauper must be hospitalized at public expense. This is a matter of pure humanity and no one, solely because of poverty, should be permitted to suffer because of lack of funds. The same reasons

apply with greater force to the class we are considering. We can visualize the head of a family who has employment and can keep it--an honest worker, frugal and thrifty, who supports his family, educates his children and has perhaps acquired an equity in a modest home. If he is injured, not in the course of his employment, the family income stops and he may require hospitalization and may lack the funds with which to enter a private institution. Must it be said that he should be refused admission to the county hospital because he is not a pauper when if he were a pauper he would be admitted without question? This would amount to the penalizing of honest industry, thrift, and independence and would place a premium on indolence and shiftlessness. Under the principles of humanitarianism, and in the interest of a sound policy, we are compelled to hold that a patient in need of hospitalization, who cannot himself, or through legally liable relatives, pay the charges of a private institution, should be admitted to the county hospital because the care of such sick or injured promotes the public health and general welfare of the community in which he lives.

"If it were necessary we could find another satisfactory reason for the admission of this class of patients to the county hospital. It is admitted that indigent persons are to be admitted when in need of hospitalization. As far as we know, the term 'indigent' has not been defined in California in so far as its use in connection with admissions to county hospitals is concerned. It has been defined in other states chiefly in

> connection with the admission of the indigent insane to hospitals. The term when thus used has been held to include persons with insufficient means to pay for hospitalization after providing for those who legally claim their support. Depue v. District of Columbia, 45 App. D. C. 54, Ann. Cas. 1917E, 414; In re Hybart, 119 N. C. 359, 25 S. E. 963; Massachusetts Gen. Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N. E. 21; People v. Board of Supervisors, 121 N. Y. 345, 24 N. E. 830. Applying this definition to the instant case, we hold that the word 'indigent,' when used in connection with admissions to county hospitals, includes an inhabitant of a county who possesses the required qualifications of residence, and who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support."

We find no cases in this State wherein the term "indigent" has been defined, however, we believe that our courts will take the same position as the California court, viz., that a person would not have to be in the pauper class to be entitled to care and treatment at the State Cancer Hospital. It need merely be shown that the person is "not financially able to provide himself with such treatment."

Section 655, R. S. Mo. 1929, provides in part as follows:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * * *
> * * * * * * * * * * * * * * * * * *

> seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; * * * * * * * * * * *"

We find no statute in our State stating the time required for a person to acquire a new residence. 19 C. J., 403, declares the rule as follows:

> "In the absence of any statutory regulation of the subject, no definite period of residence or specified length of time in a particular place is required to establish a domicile, but when coupled with the element of intent, any residence, however short, will be sufficient, even if it is but for a day."

In the case of State ex rel.v.Davis, 203 S. W.654, 199 Mo. App. 439, the court amplifies the above rule, l. c. 445, 446:

> "(Minor on Conflict of Laws, 114; Dicey on Conflict of Laws, 104.) 'Every person of full age having a right to change his domicile . . . if he removes to another place with an intention to make it his permanent residence (<u>animo manendi</u>), it becomes instantaneously his place of domicile.' (Story on Conflict of Laws, 50.) 'Neither presence alone nor intention alone will suffice to create a domicile of choice. Both must concur and at the very moment they do concur, the domicile is created.' 'The term "residence" as here used means simply the actual <u>bodily presence</u> of the party, if that

presence is coupled with the intention to remain permanently.' (Minor on Conflict of Laws, 115.) It is not necessary that the intention should be to remain one's whole life; what is meant by 'permanently' here is that there must be a fixed and definite purpose to remain 'for an unlimited or indefinite time, without any definite intention of ultimate removal.' (Minor, p. 117.) The same author at page 116 says: 'Since physical presence (coupled with the animus manendi) is all that is required, it is immaterial to inquire whether the party is living in a house of his own, in a rented house, in a hotel, in lodgings, or has no place to lay his head. These may be, and often are, of the greatest importance as evidence whereby to determine whether he has the proper animus; but if that is established otherwise they become unimportant.' . . . 'At the moment when a party, being present in a place, forms the definite intention to remain there permanently, from that moment a domicile of choice is created, which will in general continue until a new domicile is acquired.' That the above and foregoing principles, stated by the text books cited, are abuntantly sustained by the decisions, is shown by an examination of the following authorities: Ringgold v. Barley, 5 Md. 186; Mitchell v. United States, 21 Wall 350; Allgood v. Williams, 92 Ala. 551; Price v. Price, 156 Pa. St. 617; White v. Tenant, 31 W. Va. 790; Lowrey v. Bradley, 1 Spier's Eq. (S.C.) 1, 39 Am. Dec. 142 Dupuy v. Wurtz, 53 N. Y. 556; City of Hartford v. Champion, 58 Conn. 268; Guier v. O'Daniel, 1 Binn (Penn) 349, note; Sumrall's Committee v. Commonwealth, 172 S. W. (Ky.) 1057; Hart v. Lindsay, 17 N. H. 236.)"

Thus we see that all a person need to do to establish a new residence is to remove to another place with the intention of making it his permanent residence. No definite period of residence or specified length of time is required and it is immaterial whether a person live in a house of his own or with relatives.

The State Cancer Commission having determined or having been given notice that a patient has changed his residence, would have no authority to bill the county in which the patient has established a new residence until the latter county has had an opportunity to investigate and satisfy itself of the patient's condition and ability to pay.

Section 9, supra, provides that the State Cancer Hospital "shall make a charge against the county from which said patient is sent * * *."

Section 11, supra, provides that the monthly bill is to be made out and forwarded by the Administrator of the Cancer Commission "to any county court which may send to the State Cancer Hospital a patient * * *."

Section 14, supra, provides that "the several counties and the City of St. Louis sending indigent patients to the Cancer Hospital shall pay * * *."

This obviously contemplates that the county must send the patient before they become liable for his care. In other words, the patient must be recertified to the Cancer Hospital.

From the foregoing we are of the opinion that if a patient establishes a residence in a county other than that from which he was originally certified, said county becomes liable for his support irrespective of the length of residence, provided the county court has satisfied itself of the patient's inability to pay for needed

care and treatment and has recertified the patient to the State Cancer Hospital.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

TAXATION AND REVENUE: I. Cities of special statutory charter must certify their delinquent taxes on real estate to the county collector for collection unless the charter provides a special scheme of collection by a city collector. II. General taxes on real estate become delinquent on January 1st, annually, and county collector shall proceed to enforce the lien of the state thereon and may charge the fees incident thereto.

January 4, 1940.

FILED 40

Mr. Roger Hibbard
City Attorney
Hannibal, Missouri

Dear Mr. Hibbard:

We desire to acknowledge your request for an opinion from this department on December 28, 1939, which is as follows:

> "For some time there has been confusion between the offices of the City Collector of the City of Hannibal and the County Collector of Marion County, Missouri, regarding the proper time for making up the back tax books and charging the delinquent tax payers the fees incident to making entries in these books. In the past the City Collector of the City of Hannibal, has made up his back tax book and started charging these fees on January 1 of each year. The County Collector's office has made their book up on March 1 and started charging the fees as to that date. The delinquent tax payers have therefor been paying these fees to one of the offices and not to the other, thereby causing considerable confusion.
>
> "The City Collector has asked me for an opinion as to when he is required by law to make up the back tax book and charge the fees incident thereto. Section 9948 of the Revised Statutes of 1929, and Section 9945, as amended in 1933, and found in the Session Laws of 1933 at page 426, are the only sections which I find are applicable in either of these cases, and neither is very clear, particularly as to the duty of the City Collector.

"In as much as this question involves the interpretation of state statutes, and likewise affects a number of the tax payers, I am requesting your office for an opinion as to when the City Collector of the City of Hannibal is required by law to make up his back tax book and charge the delinquent tax payer the fees incident to making the entries in the back tax book.

"I will appreciate very much the opinion of your office, or any information regarding this matter."

I.

This department rendered an opinion to Honorable George W. Petty, Collector of Clay County on October 8, 1934, providing that cities with special charter provisions for the collection of delinquent taxes prevail over general statutes, a copy of which is enclosed herein.

An opinion to Honorable Otto P. Shanks, Prosecuting Attorney of Monticello, Missouri on June 16, 1939, holding that cities operating under a special charter should certify their delinquent taxes on real estate to the county collector for collection, unless the charter provides for such collection, a copy of which is enclosed herein.

II.

Section 9936, Article IX, Chapter 59, R. S. Mo. 1929, is as follows:

"All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way effect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

Section 9942 R. S. Mo. 1929 is, in part, as follows:

"At the term of the county court at which the several delinquent lists are required by law to be returned and certified, the

said court shall examine and compare the list of lands and town lots on which the taxes remain due and unpaid; * * * and cause the list so corrected to be certified and filed in the office of the clerk of the county court; * * * "

Section 9943 R. S. Mo. 1929 is, in part, as follows:

"The clerk of the county court shall file the said list in his office, and within ten days thereafter make the same into a 'back tax book,' as contemplated by section 9948, under the seal of the court, and deliver the same to the collector of the revenue of his county, * * * "

Section 9944 R. S. Mo. 1929 is, in part, as follows:

"All back taxes, of whatever kind, whether state, county or school, or of any city or incorporated town, appearing due upon delinquent real estate, shall be extended in the 'back tax book' made under this article, * * * Provided, that in all cases where the auditor or other proper officer is required by provision of charter of any city of five thousand or more inhabitants to make the list for city delinquent taxes in this section provided, and to deliver the same to the collector or other proper officer of such city, such collector or other proper officer shall proceed to collect such delinquent list in such 'back tax book,' so made out and delivered to him by the auditor or other proper officer of such city, in the manner and under authority prescribed by this law, and the chapter to which this is amendatory."

Section 9945, Laws of Missouri 1933, at page 426, is as follows:

> "Hereafter as often as any delinquent tax list or tax bills shall be received by the county court or other proper tribunal or officer from collectors at their annual settlements, the same, except as to the list of delinquent lands, shall be made by the county clerk, and as to the delinquent lands the same shall be entered of record in the county collector's office by the collector, if in counties, and if in cities containing a population of five thousand or more inhabitants, by the proper officer, into a 'back tax book,' containing the same facts and in the same form as provided in sections 9948 and 9952, as to lands, city and town lots now delinquent; except that in counties where an alphabetical arrangement of the 'land list' in the assessor's book shall have been required by an order of the county court, such collector's record of the delinquent land list shall be made out in alphabetical order, in the name of the owner, if known, and if the owner be not known, then in the name of the person to whom the tract or lot was last assessed; the collector shall proceed to collect the taxes due thereon as provided in this chapter in reference to taxes now delinquent; all taxes hereafter becoming delinquent shall bear interest until paid as provided by section 9952, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making and recording the delinquent land list, the collector who makes such book and the clerk or other officer who makes the 'back tax book' shall receive only ten cents per tract, city or town lot, and

> the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot."

Section 9948 R. S. Mo. 1929 is, in part, as follows:

> "Within thirty days after the settlement of the collector, in the odd numbered years, the several county clerks in each county in this state, and in such cities, the register, city clerk or other proper officer, shall make, in a book to be called the 'back tax book,' * * * "

Section 9963c, Laws of Missouri 1933, page 448 is as follows:

> "In all counties that have adopted or may hereafter adopt township organization, wherever the word 'collector' is used in this act, as to such counties such designation shall be construed to mean 'treasurer and ex-officio collector,' or in Section 9962 may be township collector. Where applicable it shall also refer to the collector, or other proper officer, collecting taxes in any city or town. Where applicable the word 'county' as used in this act shall be construed 'City' and the words 'county clerk' shall be construed 'city clerk, or other proper officer.'"

Under the provisions of Section 9936, Article IX, Chapter 59, R. S. Mo. 1929, all real estate upon which taxes remain unpaid on the first day of January, annually, shall be deemed delinquent and under the provisions of Section 9944, **seq.** , all back taxes <u>of</u> <u>whatever</u> <u>kind</u>

appearing due upon delinquent real estate, shall be extended in the back tax book. This section includes cities unless they are exempt therefrom, by reason of special charter schemes providing for delinquent and back taxes and the collection thereof.

Section 9945, Laws of Missouri 1933, is a reenaction of a similar section in said Article IX, Chapter 59 R. S. Mo. 1929 and provides, among other things, for the recording of delinquent tax bills and for fees for certain services.

Section 9948, supra, provides for the making of a back tax book and, among other things, for fees for certain services.

In Section 9963c, supra, the legislature recognizing that the above Article IX, Chapter 59 and amendments thereto, comprehended certain cities as well as counties, provided that where applicable the "county" as used in this act shall be construed "city" and the words "county clerk" shall be construed "city clerk" or other proper officer.

CONCLUSION

Therefore, it is the conclusion of this department that real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent and that the delinquent list, after being corrected and certified under the provisions of Section 9942, supra, shall be filed with the clerk of the county court who shall, within ten days, make the same into a back tax book under the provisions of Section 9944, supra, but that the procedure of cities of 5,000 or more inhabitants - except cities under special charters with a complete scheme for delinquent and back taxes and the collection thereof - as to making the back tax book, is controlled by the proviso in said Section 9944, supra. That the fees incident thereto cannot be charged except as provided by

statute and subsequent to the date of delinquency provided in Section 9936, supra.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB
Encls.

SCHOOLS: Member of the Board of Education convicted in Federal Court is not disqualified from remaining in office.

January 30, 1940

1-30

FILED
40.

Mr. E. W. Hickson, President
Milan School District
Milan, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of January 26, 1940, which reads as follows:

> "I am writing you as President of the Milan School District. We have a member of the School Board who plead guilty in the Western District of Missouri to violating the Federal Narcotic Law and was sentenced to two years in a penitentiary to be designated by the Attorney General of the United States. However, he was placed under probation for three years. A number of important things are coming before the School Board and I would greatly appreciate knowing whether or not this man is a member of the School Board now and if he is whether or not he is subject to ouster proceedings. This man will probably be

> a candidate for re-election as his term expires this year and it is a matter of importance to us to know whether or not he is eligible for re-election and whether or not he is a qualified voter."

Section 9328 R. S. Missouri, 1929, reads as follows:

> "The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

It will be noticed under the above section that the only qualifications of the member of the school board is that he should be a citizen of the United States a resident taxpayer of the district, and shall have paid state and county tax within one year next preceding his election. It further pro-

vides that he should be at least thirty years of age.

This office has held that when a person is convicted in the Federal Court he is still a citizen and not disqualified to vote in the State of Missouri. We are enclosing an opinion rendered by this office on October 3rd, 1938, to J. E. Woodmansee, Chairman, Board of Election Commissioners, Kansas City, Missouri, in which we held that persons convicted in the Federal Court or in courts of other states are not disqualified to vote in Missouri.

CONCLUSION

In view of the above statute, and enclosed opinion, it is the opinion of this department that the member of the school board of the Milan School District who has plead guilty in the Western District of Missouri to violating the Federal Narcotic Law, and was sentenced to two years in the penitentiary, has not lost his citizenship and can remain a member of the school board and is not subject to any ouster proceedings.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

TAXATION AND REVENUE: Length of time Jackson County Board of Equalization may remain in session.

3/21

FILED 40

March 15, 1940

Hon. William Hicks, Clerk,
County Court Jackson County,
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 13th in which you ask for an opinion upon the following matter:

> "I would appreciate very much if you would render me an opinion at your earliest convenience as to whether or not the Jackson County Board of Equalization, as a board can or may stay in session throughout the year."

Section 10149, Article 21, Chapter 59, Revised Statutes of Missouri 1929 provides as follows:

> "The county board of equalization shall meet on the first Monday of March and shall observe the following rules: First, it shall raise the valuation of all such tracts or parcels of land and any personal property, such as in its opinion have been returned below their real value; but, after the board shall raise the valuation of such real estate or personal property, it shall give notice of the fact, specifying the property and the amount raised to the persons owning or controlling the same, by personal notice, through the mail or by advertisement in any paper published in the

county, and that said board will meet on the fourth Monday of March to hear reasons, if any may be given, why such increase should not be made; second, it shall reduce the valuation of such tract or parcels of land or any personal property, which in its opinion has been returned above its true value compared with the average valuation of all real and personal property of the county, and shall adjourn its last session on or before the Saturday after the second Monday in April of each year." (Underscoring ours.)

Section 10150 of the same Article and Chapter, directs the duties of the county clerk following the completion of the equalization.

It is necessary that the equalization be completed and certified to the tax levying bodies in order that the tax levy may be made.

CONCLUSION

It is the conclusion of this Department that the Board of Equalization of Jackson County cannot remain in session any longer than the time provided by statute.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General.

ELECTIONS: Candidates can make affidavits for withdrawal
PRIMARY: of names as candidates for office in primary, anytime prior to printing of the ballot.

June 20, 1940

6-21

FILED
40

Honorable William Hicks
County Clerk
Jackson County
Kansas City, Missouri

Dear Sir:

This Department is in receipt of your letter of June 17th, which is as follows:

> "Will you kindly advise this office whether or not you have made a ruling as to when is the last day for withdrawal of candidates for the primary election, of August 6, 1940."

The section giving authority for state and county candidates to withdraw their names or to abandon their candidacies, is Section 10251, R. S. Mo. 1929, which is as follows:

> "But the secretary of state shall not certify the name of a candidate whose certificate of nomination shall have been filed in his office, who shall have notified him in writing, signed and executed with the formalities prescribed for the execution of an instrument affecting real estate to entitle it to record, that he will not accept the nomination contained in the certificate of nomination. The clerk of the county court shall not include in the publication to be made according to section 10249 the name of any candidate whose certificate of

> nomination shall have been filed in his office who shall have notified him in like manner that he will not accept the nomination. The names of such candidates shall not be included in the names of the candidates to be printed in the ballots as hereinafter provided."

We also refer you to Section 10441, R. S. Mo. 1929, and Laws of Missouri, 1937, page 294. It does not appear that the Laws of 1937 repealed Section 10441. Section 10441 appears to be a barrier prohibiting candidates to withdraw their names, said section being as follows:

> "No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and it shall be unlawful for his name to appear on more than one ballot at said primary election, and all declaration papers shall be filed with the board of election commissioners of such city, and such declaration papers shall not be withdrawn, but the names of candidates who so declare shall be printed on the official primary ballot."

However, the above section was declared to be of no force and effect by the decision of State ex rel. Neu, Jr., v. Waechter, 332 Mo. 574, l. c. 581, as follows:

> "Respondents' construction of Section 10441 cannot be upheld. When it says declaration papers cannot be withdrawn it means just that and nothing more. There are provisions somewhat similar in the general primary law. Section 10243 requires certificates of nomination filed in the offices of the secretary of state and county clerks to be 'preserved'; and Section 10252 makes it a felony, among other things, fraudulently to destroy or suppress any such certificates. And when the statute, Section 10441, provides the names of candidates 'who so declare'

> shall be printed on the official primary ballot, it is equivalent to saying the names of those who do not so declare shall not be printed. The very purpose of the law would be defeated if the statute were held to mean the name of every declarant must be published as a candidate regardless of intervening eventualities such as death, withdrawal, etc.".

The question then resolves itself into the matter of the last opportunity the candidate has to withdraw his name as a candidate for any office in the primary.

Section 10262, R. S. Mo. 1929, dealing with the duties of the clerk with reference to publishing names, is as follows:

> "Such clerks shall, upon receipt thereof, publish, under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the hours during which the polls will be opened, and that the primary will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

Under the provisions of the above quoted section notices must be three weeks prior to the primary. Therefore, if the candidate is to prevent his name from being published as a candidate he must withdraw prior to three weeks before the primary.

Section 10265, R. S. Mo. 1929, relates to the duties of the clerk with reference to sample ballots and distribution of official ballots, the pertinent part of this section being as follows:

> "On or before the 10th day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, except that the number of ballots to be furnished to each precinct shall be one and a half times the number of votes cast by any party in the last preceding election and having nominees and tickets at such primary election."

Assuming that a candidate does not withdraw his name from the primary as provided under Section 10251, supra, three weeks prior to the primary as provided in Section 10262, supra, thereby preventing his name from appearing in the notice, we think that he can prevent his name from being printed or withdraw his name from the ballot if such declaration of withdrawal is made before the ballots are printed as provided by Section 10265, supra.

It is, therefore, our opinion that any candidate can make the necessary affidavit for withdrawal of his name anytime prior to the printing of the ballot, and such affidavit should be honored by the county clerk.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting)Attorney-General

OWN:EG

PUBLIC SERVICE COMMISSION:) Annual license fee of interstate
) motor vehicles under Section 5272,
MOTOR VEHICLES:) Laws of Mo. 1931.

January 5, 1940

FILED
41

Mr. Robert E. Holliway
Secretary
Public Service Commission
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department. We set forth your letter of request in full, as follows:

> "Section 5272 of the Missouri Bus and Truck Law, Laws of Missouri, 1931, pages 304-316, inclusive, as amended, contains the following consecutive provisos:
>
> "1. 'PROVIDED, that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee hereinafter set out.'
>
> "2. 'PROVIDED FURTHER, that where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee hereinafter set out.'

"It is the request of the Public Service Commission that you give an opinion on the second proviso, stating whether or not the Commission should collect from motor carriers operating upon the public highways of Missouri in interstate commerce, who use a route in excess of ten miles but which is not greater than twenty miles, only one-half of the annual license fee mentioned in the table of fees in Section 5272.

"The first proviso clearly manifests a legislative intent to extend to interstate motor carriers the privilege of using a route in Missouri, which is ten miles or less in length, for one-third of the annual license fee mentioned in the table of fees in Section 5272. It has been so construed.

"It is not clear, however, whether or not it was the legislative intent to give a route of ten to twenty miles in length within this State to interstate motor carriers for one-half of the annual license fee mentioned in the table in Section 5272. Recently, interstate motor carriers have requested that the one-half fee provision for a 20-mile route be extended to them. They contend that, if the 20-mile proviso be construed to apply to intrastate motor carriers only, an unlawful discrimination would exist against such interstate operators.

"It would also be appreciated if you would give an opinion stating whether or not the term 'route,' used in each of the foregoing provisos, applies to a definite, measurable 'regular route,' as defined in Section 5264-(g).

> It is the opinion of the Commission that it would render the two provisos unworkable if the term 'route' should be construed to mean an 'irregular route' as well as a 'regular route.'
>
> "Inasmuch as the questions submitted pertain to the collection of license fees by the Commission, although in moderate amounts only, the Commission deems it advisable that the Attorney General should pass upon the questions herewith submitted."

Your request is divided into two questions, your first question being whether or not the Public Service Commission should collect from motor carriers operating on the public highways of Missouri in interstate commerce, who use a route in excess of ten miles but which is not greater than twenty miles, one-half of the annual license fees as provided in the table in Section 5272, R. S. Mo. 1922, as amended by Laws of Missouri, 1931, page 311, or should they be charged a full annual license fee?

Your question calls for a construction of proviso number 1 and proviso number 2 as set forth in Section 5272, Laws of Missouri, pp. 311-312. It will be noted that the first proviso definitely and clearly states "that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee hereinafter set out." However, the second proviso, as set forth above, Laws of Missouri, 1931, page 312, is not so clear and positive in its meaning and for that reason we have to look further to determine the legislative intent and what was intended by the language used in the second proviso:

> "Where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee hereinafter set out."

We have come to the conclusion that it was the intention of the Legislature to charge both intrastate and interstate motor carriers a license fee of one-half the annual license fee mentioned in Section 5272, supra, on each motor vehicle which is to be operated over a route in this state, the total mileage of which is not greater than twenty miles. It seems both consistent and reasonable that the Legislature was attempting to graduate the license fees on both intrastate and interstate carriers in proportion to the privilege of using the highways; one-third of the license fees for operators of less than ten miles, and one-half the license fees for operators of not greater than twenty miles. If this section was construed to mean that an interstate carrier should be charged the full license fee where the total mileage is not greater than twenty miles and the intrastate operator was to be charged a one-half fee, there might be some question as to the constitutionality of the act.

In the case of Prouty v. Coyne, 55 Fed. (2d) 289, l. c. 292, it is said:

> "The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, providing the charge is only a reasonable and fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon. (Cases cited)."

A cardinal rule of interpretation of statutes is that a construction should always be given a statute which would render it constitutional rather than unconstitutional.

In the case of Brashear Freight Lines v. Public Service Corporation, 23 Fed. Sup. 865, l. c. 869, the court in commenting on the second proviso, as aforesaid, said the following:

> "The contention that the assessment of a fee of one-third the usual amount for operations less than ten miles in length within the State

> and one-half the usual amount where the operation is twenty miles or less, is unreasonable, is without merit."

The court therein indicated the same construction that we have given those two provisos. The plaintiffs in the Brashear Case, supra, were all interstate motor carriers, who were challenging the validity of the fees in Section 5272, supra.

It is, therefore, our opinion that interstate carriers should be charged one-third the fee for operations of less than ten miles, and for operations less than twenty miles one-half the regular fee.

II

As to your second question, whether or not the term 'route' used in each of the foregoing provisions, applies to a definite, measurable 'regular route,' as defined in Section 5264-(g), we are of the opinion that the term 'route' as used in the two provisos in your letter of request, refers to 'regular routes' as defined in Section 5264-(g), Laws of Missouri, 1931, page 305, wherein "the term 'regular route,' when used in this act, means that portion of the public highway over which a motor carrier usually or ordinarily operates or provides motor transportation service."

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

CRH:EG

BANKS & BANKING: Interpretation of Senate Bill No. 312, Laws of Mo., 1939, p. 758. Amounts of state bonds and municipal bonds that may be held without limitation.

3/1

January 22, 1940

FILED
41

Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter, which is as follows:

> "I am enclosing a copy of Senate Bill No. 312, enacted at the last session of the Legislature, and shall appreciate an opinion as to whether bonds or other evidences of debt of any state of the United States other than the State of Missouri may be purchased by banks without limitation, or whether the restrictions outlined in sub-paragraph 3 of paragraph (a) of sub-section 1 of Section 5357 apply to bonds or other evidences of debt of any state of the United States other than the State of Missouri as well as to the bonds or other evidences of debt of any county, city or school district of such foreign state."

You also ask our opinion on what effect the act appearing in Laws 1939, p. 758, has upon subsection (g) of an act appearing in Laws 1935, p. 378.

I

Senate Bill 312 as enacted by the 60th General Assembly appears in Laws 1939, p. 758, as Section 5357. By part 1 of

this act banks, that are subject to its provisions, may not lend to a body politic "either by means of letters of credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations" amounts which will exceed fifteen per cent of the capital stock actually paid in and surplus fund of said bank if located in a city having a population of one hundred thousand or more; or twenty per cent if located in a city having a population of less than one hundred thousand and over seven thousand; or twenty-five per cent if said bank is located elsewhere in the state.

The act, after placing the above limitations upon banks, then provides some exceptions which are as follows:

> "(a) The restrictions in this subdivision shall not apply to -
>
> 1. Bonds or other evidences of debt of the government of the United States or its territorial possessions or of the State of Missouri or of any city, county, town, village or political subdivision of this state.
>
> *
>
> 3. Bonds or other evidences of debt of any state of the United States other than the State of Missouri or of any county, city or school district of such foreign state, which county, city or school district shall have a population of fifty thousand or more inhabitants, and which shall not have defaulted for more than one hundred twenty days in the payment of any of its general obligation bonds or other evidences of debt, either principal or interest, for a period of ten years prior to the time of purchase of such

> investment and provided that such bonds or other evidences of debt shall be a direct general obligation of such county, city or school district."

It is clear that the terms of Section 5357, part 1, are completely negatived by part (a) 1, of the same section insofar as it applies to bonds and other evidences of debt of the government of the United States or its territorial possessions or of the State of Missouri or of any city, county, town, village or political subdivision of this state. The rule on this is stated in Castilo v. State Highway Comm. 279 S. W. (Mo. Sup) l.c. 678 to be: "when the restriction laid in the main part of the act is lifted by the proviso, (or exception) the whole act must be read as though the restriction never existed as to the matter covered by the proviso."

It is equally clear that the terms of Section 5357, part 1, are negatived by part (a) 3 of the same section insofar as it applies to bonds and evidences of debt of other states of the Union, excepting Missouri. And, also as to bonds and evidences that are direct general obligations of a county, city or school district of other states of the Union, other than Missouri, if said foreign county, city or school district has a population of fifty thousand or more and has not in the ten years prior to the time the bank purchases its bonds and evidences of debt been in default for more than one hundred twenty days in the payment of the principal or interest on any of its general obligations.

Therefore, it is the opinion of this department that banks in Missouri are not limited by the terms of Section 5357, part 1, Laws 1939, p. 760, in the amount of bonds or other evidences of debt they may acquire of, or loans they may make to the United States Government, the State of Missouri, or a body politic of this State of the class named in Section 5357 (a) 1. Neither are said banks limited as respects other states of the Union or a county, city

or school district of another state of this Union if said county, city or school district can meet the conditions prescribed in Section 5357 (a) 3.

This conclusion must be subject to a condition later to be considered.

II

Section 5357 R. S. Mo. 1929 was amended in Laws 1935, page 378, by adding subsection (g). The purpose of that amendment was to lift the restriction placed on the amount of loans a bank might make to an industrial or commercial business if at the time of making such loan a Federal Reserve Bank or the Recontruction Finance Corporation had agreed to purchase or discount said loan, then, in that event in ascertaining the maximum amount the bank might loan under the terms of Section 5357, part 1, the part these federal agencies had agreed to discount or purchase was not to be considered.

Section 5357 R. S. Mo. 1929 was again amended in Laws 1939, p. 758, by striking out (a) and (b) of subdivision 1 and substituting (a) 1, 2, 3, 4 and (b). (See Laws 1939, p. 760, et seq). Then the legislature, in complying with the Constitution by setting forth the whole section, as it was to be after the amendment, copied the balance of the section as it appeared in the Revised Statutes of 1929 completely overlooking the addition of subsection (g) made in Laws 1935, page 378, in that subsection (g) was not copied into the Act as it appears in Laws 1939, p. 758. This method of legislation is not a literal compliance with Section 34, Article 4 of the Missouri Constitution. Whether this omission is fatal remains to be seen.

In either event, Section 5357 -1(g) Laws 1935, p. 378, is still in effect. The act of 1939 is not a repaling act but only purports to amend Section 5357 R. S. Mo. 1929. Neither is there anything in the 1939 act that conflicts

with subsection (g) of the 1935 act so that it would be repealed by implication.

Respecting the omission above mentioned Section 34 Article 4 of the Missouri Constitution is as follows:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended." (Underscoring ours)

We have examined all cases in this jurisdiction that we can find which apply and interpret this constitutional provision and its forbearer Section 25, Article 4 of the Missouri Constitution of 1865. These cases may be classed in four categories. The first deals with legislation where one section of an act, consisting of several sections was amended - the one section set forth in full, but not the whole act. This has been held to be proper. State vs. Thruston 92 Mo. 325, 326; State vs. Chambers 70 Mo. 625, 627. The second class of legislation is where a section is amended without the usual prefatory statement as to that portion to be stricken or inserted, but merely designating the section to be amended and setting forth in full the new section as amended. This has been held to be proper. Morrison vs. St. L. Iron Mt. & So. Ry. Co. 96 Mo. 602; State vs. Bennett 102 Mo. 356; State ex inf v. Herring 208 Mo. 708, 724. The third class is where new sections are added to an act containing several sections without setting out the new and old sections in full. This has been held proper. State vs. Hendrix 98 Mo. 374. The fourth class is where a prefatory clause is used stating the words to be stricken or inserted and then the section as amended set out in full. This is also proper.

Cox vs. Hannibal & St. Joseph R. R. Co. 174 Mo. 588, 601. In French vs. Woodword 58 Mo. 66, it is held under the Constitution of 1865, that a statute could not be amended by referring to the previous act and saying it "is hereby amended so as to authorize the city marshall to act as deputy constable." This because the act as amended was not "set forth and published at length, as if it were an original act or provision" as was required by the Constitution of 1865. In City of Boonville v. Trigg 46 Mo. 288, the court held valid an act amending the charter of Boonville. Section 1, Laws 1838-39, p. 294, of the charter contained a description of the boundaries and other provisions relating to the officers. In Laws of 1868, p. 191, Section 1 was amended only as pertains to the boundaries and was not then set out in full as amended. The court held this valid on the theory that the 1865 Constitution permitted parts of the section to be amended without setting forth in full all the other parts, but went on to say that a provision, as our Constitution reads today, would prevent such manner of legislation.

The above summary clearly shows that the precise point before us has not yet been passed upon by the courts, yet all cases heretofore cited with the one exception are emphatic in saying the amended section must be set forth in full. Other cases using the same statements are: State ex rel v. Miller 100 Mo. 439, 446; Burge vs. Wabash R. R. Co. 244 Mo. 76, 88; State vs. Berry 253 S. W. 712, 714 (Mo. Sup.); State vs. Fenley 275 S. W. 36, 39 (Mo. Sup.); State ex rel vs. Wellston Sewer District of St. Louis Co. 58 S. W. (2nd) 988, 995 (Mo. Sup.).

All the cases heretofore cited are clear in that legislation to meet the requirements of Section 34, Article 4, Missouri Constitution must set out in full the law incorporating said amendment. Examples of this are: State v. Fenley 275 S. W. l.c. 39 and State v. Berry 253 S. W. l.c. 714, where it is said, "The section as amended must be set out in full." State ex rel v. Miller 100 Mo. l.c. 446 where the court states, "When an act undertakes to amend a former statute it is not sufficient to say certain words are stricken out, or certain words inserted, but the section as amended must be set out in full, and this is all that is required." Morrison v. St. Louis

Iron Mt. & So. Ry. Co. 96 Mo. l.c. 606 where it is said, "When a section of an existing statute is amended, the sections, as amended, must be set out in full; nothing more is required." State v. Thruston 92 Mo. l.c. 327, states respecting this that the section, "when amended shall be fully set forth in the amendatory act as amended." State v. Chambers 70 Mo. l.c. 628, where it is said the Constitution, "requires the entire act, when the amendment relates to the entire act, to be set out in full, or when the amendment relates only to certain sections of an act to be amended, that only the sections as amended should be fully set out." (Underscoring in the above quotations ours).

Section 5357 Laws 1939, page 758, is a single section and if we accept the phrase "set forth in full as amended" in the ordinary usual meaning applied to the words, as must be done, then the amendment of said section is not strictly in compliance with the Constitution for the reason the section is not set forth in full. Subsection (g) Laws 1935, p. 378, has been omitted.

This omission causes the status of Senate Bill 312 Laws 1939, p. 758, to be doubtful and our conclusion heretofore reached respecting the rights of banks under Senate Bill 312 must be qualified to the extent that we assume it to be valid and only interpret its meaning.

Therefore, it is our opinion that subsection (g) of Section 5357 Laws 1935, p. 378, is in no way affected by the enactment of Senate Bill 312 Laws 1939, p. 758, and that said subsection still exists as law.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
LLB:RT

TAXATION AND REVENUE: Lands purchased by a trustee appointed under Section 9953b are held by such trustee for the sole purpose designated by said statute and does not affect paramount or Junior tax liens assessed and levied for years subsequent to the years for which the land was sold to such trustee.

February 16, 1940.

FILED
41

Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Hoffman:

We desire to acknowledge receipt of a request for an opinion from Mr. John W. Mitchell, Assistant Prosecuting Attorney, dated February 14th, which is as follows:

> "I should like your opinion as to whether or not lands purchased by a trustee under the provisions of Section 9953B laws of Missouri 1939, page 851, are subject to taxation for City, State, School or County purposes after the filing for record by the trustee of the collector's deed conveying the land to him."

Section 9953a is, in part, as follows:

> " * * * No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. * * * "

Section 9953b is, in part, as follows:

> " * * * All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon

> order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

Section 6, Article X of the Constitution of Missouri, is as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 7, Article X of the Constitution of Missouri. is as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

The legislature made plain the purpose in creating such trustee:

> " * * * to purchase at such sales all lands and lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids."**(Underscoring ours)

The capacity in which such trustee holds such lands, is as follows:

> " * * * Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * "

We are unable to find any expression in said statute referable to future assessments and levies for general taxes or future assessments and levies of Junior tax lienors. The stated purpose of such statute was to protect the taxes "due and owing" and for which the sale was held.

If it had been the intention of the legislature to vest in the governmental bodies for which the taxes were assessed and levied, such title as to bring such property within the purview of the above constitutional provision, relating to exemption, there would have been some expression indicating such intention. The rule as to the construction of statutes with reference to the question of exempting property from

taxation is stated in the case of State v. Gehner, 11 S. W. (2nd) 30, 34:

> "Taxation is a sovereign right of the state, and the abandonment of the right to exercise it can never be presumed; but the intention to abandon it must appear in the most clear and unequivocal terms, as was twice said by this court in early decisions and reiterated in later decisions. Lexington v. Aull, 30 Mo. loc. cit. 487; Pacific Railroad v. Cass County, 53 Mo. loc. cit. 27. 'An exemption from taxation must be clear and unambiguous and should not be created by implication.' Scotland County v. Railroad Co., 65 Mo. 134; State ex rel. v. Arnold, 136 Mo. loc. cit. 450, 38 S. W. 79.
>
> "' In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' Fitterer v. Crawford, 157 Mo. loc. cit. 58, 57 S. W. 533, 50 L. R. A. 191.

> "'As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' Kansas Exposition Driving Park v. Kansas City, 174 Mo. loc. cit. 433, 74 S. W. 981."

In the case of St. Louis v. Wenneker, 145 Mo. 230, 238, property was left to said city as trustee for charitable uses and it was contended that such property was exempt under the above constitutional provision. The court held:

> "We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted, is that of which such county or city is the beneficial owner, which is held by it 'for its own use' and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation."

In the case of Grand River Drainage District v. Reid, 111 S. W. (2nd) 151, the court held that the land purchased by the district to protect its lien for delinquent taxes was exempt from taxation, but such decision was made because there was a specific statute providing "that upon conveyance to the district such lands shall thereupon become the property of the drainage district." On page 153, the court said:

> " * * * Drainage districts are of statutory origin, possessing only such power as is expressly delegated or necessarily implied from those granted. So long as they proceed in conformity

> with the expressed or implied authority conferred, we perceive no reason why they may not successfully invoke the protection of section 6, art. 10 of our Constitution. * * * "

There is no expression in Section 9953b, supra, from which we may conclude that the legislature intended that the property bought by the trustee should become the property of the state or a subdivision thereof, yet there are expressions - none inconsistent with each other - indicating that the property so purchased should <u>not</u> become the property of such governmental units.

CONCLUSION

Therefore, it is the opinion of this department that lands purchased by a trustee appointed under the provisions of Section 9953b, Laws of Missouri 1939, at page 851, are held by such trustee for the sole purpose designated by said statute, i. e., as trustee for the benefit of all funds entitled to participate in the taxes against the lands sold and to receive a pro rata part of the proceeds of a sale made by the trustee under order of court; that the purchase of such lands by such trustee does not affect paramount or Junior tax liens assessed and levied for years subsequent to the years for which the land was sold to the trustee.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

INITIATIVE PETITIONS:)
ELECTIONS:)
CORPORATIONS:)

Corporations may contribute money to secure signers on initiative petitions for Constitutional amendments.

February 24, 1940

2-26

FILED
41

Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

This is to acknowledge receipt of your letter of February 12th in which you enclosed a letter from Mr. W. J. Bramman, President of the St. Louis Clearing House Association, in which an opinion is requested of this Department on questions set forth in his letter. We have had communications with persons interested in our opinion, and, after discussing the matter with them, will confine the request to question number three as set forth in Mr. Bramman's letter :

> "May banks and other corporations contribute to the Missouri Institute for the Administration of Justice with the understanding that all such contributions shall be set aside in a separate fund and used exclusively for the purpose of securing signatures to initiative petitions?"

We understand from the letter, which we will not set forth in full, that the Institute for the Administration of Justice is a corporation organized by pro forma decree under the laws of Missouri as a voluntary, non-profit organization, whose avowed purpose is, as stated in its articles of association: "for the following purposes useful to the public; to promote, foster and improve the administration of justice." The Institute is now particularly interested in sponsoring an amendment to the Constitution of Missouri, which has for its purpose the providing

of a method for the selection of judges of our courts, different from the present method, and it is the desire of the Institute at this time to secure signatures to initiative petitions so that such a proposition may be placed on the ballot at the November Election this year.

Our attention has been directed to Section 10478, R. S. Mo. 1929, Mo. Sta. Ann. 5, page 3816, which provides in part as follows:

> "It shall not be lawful for any corporation organized and doing business under and by virtue of the laws of this state, to directly or indirectly, by or through any of its officers or agents, or by or through any person or persons for them, influence or attempt to influence the result of any election to be held in this state, or procure or endeavor to procure the election of any person to a public office by the use of money belonging to such corporation, or by subscribing any money to any campaign fund of any party or person, * * * or to use or offer to use any power, effort, influence or other means whatsoever, to induce or persuade any employee or other person entitled to register before or vote at any election, to vote or refrain from voting for any candidate, or on any question to be determined or at issue at any election. * * * *"

The section further provides for forfeiture of its charter or franchise for willful misuser thereof and such corporation shall be enjoined from transacting any business in this State. Although this particular section has been on the statute books since 1897 (Laws of Missouri, 1897, page 108), we do not find that any case has reached the appellate courts construing said section.

After a careful reading of the above section we do not believe that it was the intention of the Legislature to prohibit corporations from donating funds to the Institute, or other persons, for the purpose of defraying the expenses of obtaining signatures on an initiative petition to change the Constitution of Missouri, for the reason that it would not be the using of funds to influence or attempt to influence the result of any election held in this state nor would it be for the purpose of inducing or persuading any person entitled to vote at any election, to vote or refrain from voting on any question to be determined or at issue at any election. It is merely providing the funds to submit a constitutional amendment to the people, for its adoption or rejection.

It is, therefore, our opinion that banks and other corporations organized and doing business in Missouri, may donate funds to the Missouri Institute for the Administration of Justice for the purpose of enabling said Institute to defray the expenses of obtaining signatures for the initiative petition mentioned above, and in so doing would not violate the provisions of Section 10478, Revised Statutes of Missouri, 1929.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

CRH:EG

TAXATION AND REVENUE: Failure of certificate holder to have executed and recorded a deed within four years from the date of sale, under the provisions of Section 9954c causes the amount due such purchaser to cease to be a lien on the lands and lots for the particular years involved.

March 8, 1940

FILED
41

Mr. E. A. Holloway
Chief Clerk
Auditor's Office
Jefferson City, Missouri

Dear Mr. Holloway:

We desire to acknowledge your request for an opinion on March 2, 1940, which is as follows:

> "The question has been raised concerning the rights of a county collector to issue a deed to the holder of a certificate of purchase. The question depending upon the construction of Section 9954c as found on page 435, Laws of Missouri, 1933. Can a deed be issued now on a tax sale certificate dated November 13, 1935? If not, does the property revert to the original owner and if so what recourse, if any, has the purchaser of the certificate."

Section 9956a Laws of Missouri 1933 at page 437 is in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together

> with interest at the rate specified in such certificate, not to exceed ten per-centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such re-demption. * * * * * * "

After the two years period of redemption the certificate holder may obtain a deed under the conditions provided in Section 9957 thereof, at page 438, which is in part as follows:

> "If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a sur-vey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a con-veyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was infer-ior to the lien for taxes for which said tract or lot of land was sold. * * * * "

Under the provisions of Section 9957c thereof, at page 440, the certificate holder forfeits his right of priority to the sub-sequent purchaser in event he does not keep subsequent taxes paid, and thereby suffers the lands and lots to be offered for such sub-sequent taxes and a certificate to issue for the same. Said sec-tion being in part as follows:

> "Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, * * * * * "

and

> " * * * * Said holder of a certificate of purchase permitting a subsequent certificate to issue on the same property, shall, on notice from the county collector, surrender said certificate of purchase on payment to him of the redemption money paid by the subsequent purchaser."

In event a certificate holder gets possession, at anytime after one year from the date of sale, during the redemption period unless sooner redeemed, under the provisions of Section 9954a thereof, at page 434 and fails to pay the taxes provided in Section 9954b thereof, at page 435, or commit waste upon the occupied premises he shall suffer the forfeiture of rights mentioned in said Section 9954b, which is as follows:

> "Any purchaser at delinquent tax sale of any tract or lot of land, his heirs or assigns, who takes possession of any tract or lot of land within the redemption period shall be required to pay the taxes subsequently assessed on such tract or lot of land during the period of occupancy and within the redemption period, and upon fail-

> ure so to do, or if he commit waste thereon, such purchaser, his heirs or assigns, shall forfeit all rights acquired by his certificate of purchase, so far as the tract or lot of land taken possession of is concerned."

Under the provisions of Section 9954a supra, the tenants rights are established and provision made that the certificate holder, in possession, must apply the rent as payment on the certificate. The rights, of such purchaser in possession within the redemption period in and to planted, growing or unharvested crops are to be protected in the same manner as such purchasers would be protected in lasting improvements made upon said lands after the period of redemption and referred to in Section 9956c thereof, at page 437 which is as follows:

> "In case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, and the land on which the same shall have been made shall be redeemed as aforesaid, the premises shall not be restored to the person redeeming, until he shall have paid or tendered to the adverse party the value of such improvements; and, if the parties can not agree on the value thereof the same proceedings shall be had in relation thereto as shall be prescribed in the law existing at the time of such proceedings for the relief of occupying claimants of lands in actions of ejectment. No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes."

Such are the rights and duties of the certificate holder under Senate Bill ,94, Laws of Mo. 1933. He may not obtain a deed thereunder until after the redemption period of two years and then only by compliance with the above statutes. After such period he may obtain a deed by performing his other statutory duties.

Under the above statutes he may have possession of the premises after one year and could after two years, make valuable and lasting improvements on the premises and require payment therefor as a prerequisite to redemption.

In the case of Hilton v. Smith, 33 S. W. 464, 466 in construing the right of a certificate holder under a similar statute the court held:

> " * * * After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. * * * "

With such right how long should the certificate holder be permitted to collect rents and charge the property with improvements? Certainly there should be a limitation placed thereon. So, with this in view, the legislature passed Section 9954c at page 435 of the laws of Mo. for 1933, which is as follows:

> "In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale: Provided, That on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided."

This section is clear. It means that the certificate holder must have his deed executed and recorded "within four years from the date of sale" which of course means: four years after the date of sale evidenced by the certificate of sale. The lien for taxes is in rem and a charge only against the land. Under the above proviso the certificate holder failing to cause such deed to be executed and recorded within such time suffered the loss of the lien for which the land was sold and he received the certificate of purchase. Therefore, his rights under the certificate were forfeited because of his own failure to exercise such "naked right" received thereunder.

CONCLUSION

Therefore, it is the conclusion of this department that the holder of certificate of purchase issued by the collector after advertisement and sale for delinquent taxes on real estate, under the provisions of Senate Bill #94, Laws of Mo. for 1933 at page 425, failing to cause a deed to be executed and recorded within four years from the date of such sale, by such failure, caused the amount due such purchaser to cease to be a lien on the lands described in the certificate and thereby he lost all rights thereunder, leaving the lands and lots in statu quo as to the tax liens for the particular years involved.

It is further our opinion that a collector may not now execute and record a deed to a holder of a certificate of purchase nor his assignee upon a certificate issued November 13, 1935 by reason of such statute of limitations.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

SVM/ww

TAXATION: Town and village delinquent real estate taxes are to be collected by County Collector. He must accept list certified to him even though late and must sell to satisfy lien even though the state and county taxes are not delinquent.

May 1, 1940

FILED
41

Hon. James F. Hohimer
Monroe County Collector
Paris, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 17, 1940, which is as follows:

> "The village of Stoutsville, this County, has the sum of about $300.00 in delinquent taxes. The Village Clerk wants to certify the delinquent list to me for collection. Do I have to accept the list under Section 7109 R. S. 1929? And is it essential that such list be certified on or before the first Monday in March as recited in Section 9970, page 451 of the Session Acts of 1933?
>
> "If the same parcels certified as delinquent by the Village Clerk are not delinquent in county and state taxes, is it incumbent upon me to advertise such village taxes at the regular November sale?"

Section 7108 R. S. Mo. 1929 provides that the chairman of the board of trustees of a town or village shall obtain from the clerk of the county court, on the first day of June in each year, an abstract from his (the county clerk's) assessment books of all the property in the town made taxable by law for state purposes, and the assessed value thereof. Upon this abstract the board of trustees then is to make the annual tax levy for the year.

Section 7109 R. S. Mo. 1929 provides for the town collector to make a delinquent list of taxes remaining due and unpaid on the first day of January of each year and to return said list to the board of trustees. The board must examine said delinquent list at its next

meeting or as soon thereafter as is convenient, approve it and then said list with bills therefor is to be placed in the hands of the county collector who is to "proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected."

Section 9970, Laws of Missouri 1933, p. 451 provides:

> "The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first Monday in March, annually, return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer of the city or town, and shall stand as evidence of indebtedness upon the part of the county collector and his bondsmen to such city or town, until settlement in full has been made by payment to said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

Under the above statutes it is clear that the county collector is charged with the duty of collecting delinquent real estate taxes of towns and villages and this being so he must accept the list and bills placed in his hands by the town or village.

The enactment of Section 9970, supra, had the effect of fixing the first Monday in March each year as the last date the list and bills are to be placed in the hands of the county collector, but this section does not prevent it being done sooner since it provides that it should be done "on or before" that date. However, even if the delinquent list was placed in the hands of the county collector after the first Monday in March, we think he must accept it, because the taxes contained in said list can still be collected. In State ex rel. v. Stamm, 165 Mo. 73, 83 it is said:

> "'Requirements that do not affect the rights or interests of the taxpayers, but made simply for the purpose of securing order, system and convenience in the dispatch of public business are directory in their character - a literal compliance with which is not essential to the validity of the tax.'"

The requirement that this list be delivered by the first Monday in March is such a provision, and the above case bears out our statement that the county collector must accept the list even if delivered late for the reason his duty is to collect the valid delinquent taxes of towns and villages and even though late the taxes are nevertheless valid.

It also is incumbent upon the county collector to proceed to advertise the delinquent list placed in his hands by the town or village at the time required by law even though the property contained in said list is not delinquent for state and county taxes.

Section 9952a, Laws of Missouri 1933, p. 430 provides:

> "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday in November of each year * *."

Section 9952, Laws of Missouri 1933, p. 429, makes it clear that the taxes mentioned in Section 9952a means also the taxes of towns and villages. This is ascertained from the fact that said section requires the county collector to make a book containing all real estate returned and remaining delinquent for taxes "including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes * * * separately stated".

According to the terms of Section 9952b, Laws of Missouri 1933, p. 430, the list of delinquent lands and lots that is advertised for sale is made up from the land and lots listed as delinquent in the book made by the county collector. The county collector is directed to cause a copy of "such list of delinquent lands and lots" to be printed in some newspaper and after the required

publication said property is sold to discharge the lien.

It is apparent that the reference to "such list of delinquent lands and lots" in Section 9952a refers to the delinquent property required to be listed in the book the collector makes under Section 9952 and that book, containing the delinquent taxes of a town or village separately stated, is the list of "all lands and lots on which taxes are delinquent and unpaid" that are made subject to sale by Section 9952a. It is to be noted Section 9952a does not require all taxes, city, state and county, to be delinquent before the land is made subject to sale, but only requires that there be land or lots "on which taxes are delinquent and unpaid". The town's taxes are taxes and are clearly included by the provision of Section 9952 in the "taxes" referred to in Section 9952a that land may be sold to satisfy.

Any other construction would permit a person, if he so desired, to forever defeat the tax lien of a town or village by merely keeping his state and county taxes paid and thus prevent the sale of the property to satisfy the town's tax lien.

CONCLUSION.

It therefore is our opinion that the county collector must accept the delinquent list of land and lots placed in his hands by the board of trustees of a town or village and it is not essential this be done before the first Monday in March each year. Our opinion also is that land and lots must be advertised and sold by the county collector for the town and village taxes even though that is all that is delinquent, and said property is not delinquent for state and county taxes.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General.

LLB:CP:BJ

LOAN COMPANIES: When Finance Commissioner has authority to revoke or refuse to issue license to "Small Loan" company.

October 1, 1940

10-V

FILED
41

Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

We are in receipt of your recent request for an opinion, wherein you state as follows:

> "I am enclosing a copy of the Rules and Regulations governing Licensees under the Small Loan Law and wish to direct your particular attention to paragraph 12 on page 13 thereof, which reads as follows:
>
> "'No business of any kind shall be operated in the same place of business as that of a licensee, under any act, plan, or scheme, wherein any act is done or any loan is made in violation of any law.'
>
> "A number of companies licensed to operate under the Small Loan Law conduct their business in the same offices with companies operating under the Loan and Investment Act and, in view of the pending suit in which you charge that the Loan and Investment Act is unconstitutional, I shall appreciate an opinion as to whether or not this Department can legally revoke or refuse to issue a license if the business of the licensee is or is to be conducted in

> the same office with a company operating under the Loan and Investment Act."

There is a well-defined rule that statutes are presumed to be constitutional unless the contrary is clearly shown (Springfield v. Smith, 322 Mo. 1129, 19 S. W. (2d) 1), so that until the courts declare the present Loan and Investment Act unconstitutional we can presume its constitutionality. Hence, it is not necessary here for us to determine the constitutional question.

Your query then narrows down to whether the Finance Department can legally revoke or refuse to issue a license to a "Small Loan" company if the business of the licensee is or is to be conducted in the same office with the company operating under the Loan and Investment Act.

This Department under date of August 23, 1939, approved a set of rules and regulations for your office in the licensing of companies doing business under the "Small Loan Law" (Chap. 34, Art. 7, Revised Statutes of Missouri, 1929, as amended by Laws of Missouri, 1939, page 772). On page 13 of said rules and regulations we find the following:

> "12. No business of any kind shall be operated in the same place of business as that of a licensee, under any act, plan, or scheme, wherein any act is done or any loan is made in violation of any law."

The above rule is clear and unambiguous and under its terms you must not permit a "Small Loan" company properly licensed to do business, to conduct its affairs in the same office with any other business where any act is done or loan made in violation of any law.

From the foregoing, we are of the opinion that if you have knowledge that a "Small Loan" company is conducting its affairs in the same office with a company doing

business under the Loan and Investment Act or with any other business where loans are made in violation of the law or acts done in violation of the law, you have authority to legally revoke or refuse to issue a license to said "Small Loan" company.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

COUNTY SCHOOL SUPERINTENDENT'S SALARY:

Change in salary caused by change in population becomes effective at the beginning of the term year.

December 31, 1940

1/3

FILED
41

Honorable H. C. Holt
County Superintendent of Schools
Maysville, Missouri

Dear Mr. Holt:

This will acknowledge receipt of your letter of December 23, 1940, in which you ask for an opinion as follows:

> "I am writing you in regard to reduction of County Superintendents of Schools salary based on 1940 census. The population of DeKalb County is some 200 below 10,000. According to Sec. 9463 R. S. Laws 1938, this calls for reduction in my salary. The County Superintendent of Schools year ends July 1st, does my reduction start January 1st. or July 1st. of 1941?"

The salary of the county superintendent of schools is fixed by Section 9463, R. S. Missouri 1929, as amended by the laws of 1933 at page 384, and is as follows:

> "In counties having less than seven thousand population the County Superintendent of Schools shall receive One Thousand and Fifty Dollars; in counties having a population of more than seven thousand and less than ten thousand he shall receive Twelve Hundred Dollars; in counties having a population of more than ten thousand and less than twelve thousand he shall receive One Thousand Three Hundred and

> Fifty Dollars; in counties having a population of more than twelve thousand and less than fifteen thousand he shall receive One Thousand Six Hundred Dollars; in counties having a population of more than fifteen thousand and less than twenty-five thousand he shall receive One Thousand Eight Hundred Dollars; in counties having a population of more than twenty-five thousand and less than thirty-six thousand he shall receive Two Thousand Dollars; in counties having a population of more than thirty-six thousand and less than seventy thousand he shall receive Two Thousand One Hundred Dollars; and in counties having a population of more than seventy thousand and less than one hundred thousand he shall receive Two Thousand Two Hundred and Fifty Dollars, of which the State of Missouri shall appropriate annually out of the general revenue fund of the state of Missouri four hundred dollars to each and every county. The county superintendent shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasurer."

For the purpose of paying the salary the population is to be ascertained by the last previous decennial census. Section 9465, R. S. Missouri 1929, as amended by Laws of 1933 at page 385, is as follows:

> "For the purpose of ascertaining the population of any county in this state in order to determine the salaries of County Superintendents of public schools, the last previous

> decennial census of the United States shall be conclusive."

In the case of State ex rel. Harvey v. Linville, 318 Mo. 698, 300 S. W. 666, the Supreme Court, in a case involving the salary of a county superintendent of schools of Benton County, ruled as follows, l. c. 1067:

> "Section 10938, R. S. 1909, provides for ascertaining the 'annual' salary. Section 11352, R. S. 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual,' as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

Since the above decision was rendered the law has been amended making the term of office of a County Superintendent start July 1st, instead of April 1st, Section 9454 R. S. 1929.

CONCLUSION

Based on the above decision, it is the conclusion of this department that any change in the salary of the County Superintendent of Schools of Dekalb County,

which is occasioned by the 1940 census, should be put in effect at the commencement of the next year of the term of office which is, as stated in your letter, July 1, 1941.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WOJ:DA

LIQUOR: If applicant for a non-intoxicating beer license pays proper fee to county and meets other license requirements, the county court must issue a license.

January 19, 1940 1/20

FILED 42

Hon. Andrew Howard
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

We have received your letter of January 6, 1940, which reads as follows:

> "The Christian County Court is confronted with the following described problem which has placed it in an embarrassing position. The County Court refused to issue a county license for the retail sale of non-intoxicating beer to an applicant for the reasons that they have received a number of complaints from citizens of the community as to the manner in which the applicant's place of business has been operated, that it is a congregating place for drunks, and that a number of fighting and disturbance cases have originated there, and that it has a bad influence on a number of the young people of the county who go there. The County Court was complimented by a number of people on its action in the matter, and the Judges considered that they had made a wise decision. However, the applicant came back in with his State Permit from the Supervisor of Liquor Control, stated that the liquor inspector for this district as a patron of his had complimented him highly on the manner in which his place of

> business was operated, and tendered the money for a County License and insisted that he could force the County Court to issue a license regardless of what its judgment might be in the matter.
>
> "I would very much appreciate a legal opinion from you on this question: Can a County Court refuse to issue a county license for the retail sale of non-intoxicating beer in the county, if the applicant has a permit for same from the Supervisor of Liquor Control?"

It is a well recognized principle of law that when the Legislature provides a uniform system for the regulation, control and licensing of the liquor traffic, the only existing rights and powers are those contained in any such uniform legislative system. In other words, the only authority any political subdivision, such as a county or city, might have to regulate and control the sale of intoxicating liquor must be delegated by the Legislature in its uniform system. This rule is thus expressed in 33 C.J. 521, as follows:

> "In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been consistently held to have only such powers as are expressly conferred upon them by their charters or by statute, or such as are necessarily or fairly implied in or incident to the powers expressly granted, * * *."

The Supreme Court of Missouri has also said that the powers of county courts are limited and defined by statutes and the acts outside of and beyond statutory authority are void.

The Supreme Court of Missouri, in the case of Morris v. Karr, 114 S.W. (2nd) 962, said at l.c. 964:

> "In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.'"

The laws governing the sale of non-intoxicating beer are contained in Section 13139-e, Laws of Missouri, 1935, page 396. This section reads in part as follows:

> "The County Court in each county of this state or the corresponding authority in the City of St. Louis is hereby authorized to make a charge for licenses issued to retail dealers in non-intoxicating beer, the charge in each instance to be determined by the County Court or the corresponding authority in the City of St. Louis by order of record, but said charge shall in no event exceed the amount provided for in this section for state purposes. The Board of Aldermen, City Council or other proper authorities of incorporated cities, towns and villages including the City of St. Louis may charge for licenses issued to manufacturers, brewers, wholesalers, and retailers of non-intoxicating beer within their limits, which charge for licenses shall not exceed one and one-half times the amount charged for a

> state license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of non-intoxicating beer within their limits, not inconsistent with the provisions of this Act, and provide penalties for the violation thereof. No municipal corporation shall increase any occupation tax which it now levies upon any holder of any permit required by this article in excess of the amount of such tax imposed upon merchants and dealers in the same or similar lines of business and not holding any such permit."

It will be noted that the only power given to the counties in the above statute is to collect a fee from each liquor dealer; that the amount of this fee shall be such as the county court may determine, provided it is not in excess of the amount required to be paid to the state for a state license. No other powers are given to the counties. In cities, the board of aldermen or city council are given the right to "make and enforce ordinances for the regulation and control of the sale of non-intoxicating beer within their limits", but this same right is not given to the counties. Apparently, the Legislature only intended that the county receive fees and should not have the right to exercise a discretion as to whom a license to sell non-intoxicating beer should be granted.

Section 25 of the laws dealing with the sale of intoxicating liquor, Laws of Missouri, 1935, page 276, is in practically the same wording as Section 13139-3, quoted above.

Section 25 was touched upon by the Springfield Court of Appeals in the recent case of State v. Skinner, 119 S.W. (2nd) 82. In that case, the defendant was convicted of having sold intoxicating liquor without first

having obtained a county license. It appeared that he had paid the proper license fee to the county, but the county court had thereafter returned the fee to the defendant and had refused to retain it. The court said at l.c. 83:

> "We consider the case under the points as presented by the defendant. Under the first point he says: 'The Court erred in refusing to quash the information and abate the cause, for the reason that said information does not charge the defendant with violation of any law known to the State of Missouri. That there is no enforcement or penal section for the alleged violation; that under the law the County Court has no discretion in the matter of issuing licenses, and has no authority to issue a license to sell intoxicating liquors, but can only collect a fee as prescribed by statute. A County Court has no power except that conferred by statute.'
>
> "We think there is no merit to the above assignment for under the provision of Section 25, Laws of Missouri, 1935, page 276, Mo. St. Ann. Sect. 4525g-29, p. 4689, counties are authorized to charge for licenses and may issue a license upon the payment of such charges. Section 43 on page 282, Laws of Missouri, 1935, Mo. St. Ann. Sect. 4525g-48, p. 4689, provides a penalty for violating said act. It was not error to refuse to quash the information.
>
> "The second assignment briefed by the defendant is that the court erred in refusing to permit the defendant to show that he had paid the fee to the

> County Treasurer of said County, and that the County Court had no authority to exercise any discretion about the issuing of the license, and that the only requirement was the collection of said fees. The defendant cites and relies on two cases under this point, which cases are State ex rel. Fitzpatrick v. Meyers, 80 Mo. 601, and State ex rel. Cornelius et al. v. McClanahan et al.,221 Mo. App. 399, 278 S.W. 88, 89.
>
> "We think if it be conceded that the defendant made an application for a license and tendered the proper fee, and the license or permit was not issued, that is no defense to a prosecution for selling liquor without a license. Two early cases within this state dealing with questions very similar to this held against defendant's contention here. If a license is a prerequisite to selling liquor, there is no authority for such sale until a license be obtained, regardless of what attempts have been made to obtain such license. State v. Huntley, 29 Mo. App. 278; State v. Myers, 63 Mo. 324. The defendant had a remedy to force the issuance of a license by a mandamus proceeding if he had fully complied with the law, but because he thought he had complied with the law did not authorize him to sell liquor without a license, and it was not error to overrule the instruction in the nature of a demurrer to the evidence."

The above case does not define or outline in any way the powers of a county court in issuing or refusing licenses. All it decides is that a liquor dealer must

have the license or otherwise he will violate the law in making sales. However, the court did indicate that mandamus might be used to compel the issuance of a license if the law has been complied with. This indicates that the county court is vested with no discretion in the matter because otherwise mandamus would not lie. It is a general rule requiring no citation of authority that the courts will never compel an act to be done if there is a discretion involved in the doing of the act. It is only a purely ministerial act, calling for no discretion, which can be compelled by writ of mandamus.

You state further that the Supervisor of Liquor Control has issued a license to the person you have in mind and further, that you have received a number of complaints from citizens of the community as to the manner in which the applicant's place of business is being operated; that the place is a congregating place for drunks and that said premises are generally conducted in a disorderly manner. In this connection, the proper procedure would be to advise the Supervisor of Liquor Control of the facts and he, in turn, is empowered by virtue of Section 13139-z-24 of the Non-Intoxicating Liquor Laws, Laws of Missouri, 1935, page 402, to call a hearing, upon giving ten days' notice to the licensee, and revoke the license if the evidence warrants, on the ground that the licensee "has not at all times kept an orderly place or house".

CONCLUSION.

It is our opinion, therefore, that the Legislature has vested the county courts with the authority only to receive fees from liquor dealers in connection with non-intoxicating beer licenses, and that no discretion is given to this court to determine whether or not each applicant is a fit person to sell non-intoxicating beer; that if any such applicant has a license from the Supervisor of Liquor Control of the State of Missouri and pays to the county the proper amount that it is mandatory on the county court to issue a county license. If, however, any such licensee

does not at all times maintain an orderly house, the matter can be presented to the Supervisor of Liquor Control who has authority to revoke the permit upon giving ten days' notice in writing.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

FINES AND PENALTIES: Procedure for instituting suit to recover fine where a part of the proceeds go to a private informer.

March 26, 1940 3/30

FILED 42

Honorable Andrew Howard
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated March 20, 1940, which reads as follows:

"A party here wants an action instituted under Section 14279, 1929, Revised Statutes of Missouri, which reads as follows:

'Every licensed keeper of any table mentioned in section 14272 who shall suffer any person under the age of twenty-one years to play on such table kept by him without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of fifty dollars for every such offense, one-half of which shall be for the informer, to be recovered by a civil action.'

Should the procedure under this section be as in a criminal action by way of a complaint, warrant, arrest of defendant, and commitment to jail on failure to give bond? Or should the procedure be as in a civil action by way of a petition and summons?

The term fine would seem to contemplate a criminal action, but the statute winds up with the clause 'to be recovered by a civil action' in contrast to the preceding section (14278) which also refers back to

> section 14272, but winds up with the clause 'to be recovered by indictment or information.'
>
> No citations of decided cases interpreting this statute appear under same.
>
> I would appreciate a legal opinion from your office as to the proper procedure to take under the above quoted statute."

Section 14279, R. S. Mo. 1929, cited in your request, but which we again cite for the purpose of this opinion, is as follows:

> "Every licensed keeper of any table mentioned in section 14272 who shall suffer any person under the age of twenty-one years to play on such table kept by him without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of fifty dollars for every such offense, one-half of which shall be for the informer, to be recovered by a civil action."

This statute provides that one-half of the fine recovered for a breach of the provisions of said section shall be paid to the informer. There being no provision for the disposition of the remainder of the fine, it is governed by Section 8, Article XI of the State Constitution of Missouri, which is as follows:

> "All moneys, stocks, bonds, lands and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, and all moneys which shall be paid by persons as an equivalent for exemption from military

> duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

You state that the use of the word "fine" indicates a criminal action. We find the following discussion of the word in 25 C. J., page 1150, Section 5:

> "Since the word 'fine' in its strict technical sense is to be regarded as a punishment for a criminal offense a criminal prosecution is the usual mode of recovery. But the mode in which fines and penalties are to be recovered is a matter of legislative discretion; and the method pursued for the recovery of a fine depends upon the particular statutes rather then upon any rule of general application. Many of the statutes provide for the recovery of fines by civil action or by indictment.* * *"

The proceeding in which a part of the penalty recovered goes to the informer and a part to the state is known as a qui tam action, and is discussed at length in State ex rel. Rodes v. Warner, 197 Mo., page 650. In that case there was a discussion of the constitutionality of a statute giving a part of the fine to the informer in the case of a conviction under the Game and Fish Laws, and we find the following in the opinion of the court, l. c. 664:

> "(a) Where penal statutes are merely leveled at a violation of private rights, and a private person or class of persons is nominated herein as entitled to sue for and recover penalties arising from the violation of such statutes for their own use, then such penal laws are not of

> the character of penal laws referred to in section 6, article 11, of the Constitution, and the penalties provided in such laws are not devoted by the Constitution itself to the public school fund.
>
> (b) And where penalties such as are referred to in the foregoing hypothesis may be recovered by a qui tam action -- a civil action -- a part may go to the informer and the other part may be devoted to the purposes prescribed by statute law. * * * "

The exact method of procedure appears to be set out in In re. Green, 40 Mo. App. 491, l. c. 493:

> "We think the suit in which said bill of costs accrued should have been brought in the name of the State at the relation of the prosecuting attorney of Ray county, on the information of George McMullen, informer, against said railway, instead of the manner in which it seems to have been brought. If it had been instituted, as undoubtedly it should have been, then no question as to the non-liability of the county for the payment of the costs therein could have arisen under the statute, which, in express terms, provides that, where a suit is brought in the name of the state on the relation or in behalf or for the use of a private person, the person for whose use the action is brought shall be held liable for the payment thereof."

In this case, however, we wish to point out that Section 4467, R. S. Mo. 1929, provides another manner in which this fine may be recovered, and is as follows:

> "Whenever a fine, penalty or forfeiture is or may be inflicted by any statute

> of this state for any offense, the same may be recovered by indictment or information, notwithstanding another or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture: Provided, that in all cases the fine, penalty or forfeiture shall go to the state, county, corporation, person or persons to whom the law imposing the same declares it shall accrue."

A case in which the fine was recovered in this manner is found in 51 Mo. App., page 129, styled State of Missouri v. Barney Mackin. In this case the fine was recovered by indictment of a grand jury. We quote the following from the opinion of the court, l. c. 132:

> " * * * The section of the statute which forms the basis of this prosecution reads thus: 'Every licensed keeper of any table * * * who shall suffer any person under the age of twenty-one years to play on such table kept by him, without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of $50 for every such offense, one-half of which shall be for the state, the other half for the informer, to be recovered by civil action.' Revised Statutes, 1889, sec. 715.
>
> Now the contention is that this permits only a civil action by the party offended or by the state, and that no prosecution by indictment is allowed. But in this connection let us refer to section 3971, Revised Statutes, 1889, under the heading of 'crimes and punishment.' That statute reads: 'Whenever a fine, penalty or forfeiture is or may be inflicted by any statute of this state for any offense, the same may be recovered by indictment or information, notwithstanding another or

> different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture: provided, that in all cases the fine * * * shall go to the state * * * or person to whom the law imposing the same declares it shall accrue.' It is also clear that the matter charged on defendant by this indictment constitutes an 'offense' under the foregoing section."

It is therefore the conclusion of this department that suit for recovery of the penalty above set out may be brought in the name of the state at the relation of the prosecuting attorney on the information of the person claiming the benefit of Section 14279, or may be recovered by information or indictment under Section 4467, as outlined above.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

CITIES OF 4TH CLASS: ILLEGALITY OF PART OF PROPOSED ORDINANCE.

October 7, 1940.

10-7

FILED
42

Hon. Jerome L. Howe
8825a Manchester
St. Louis, Missouri

Dear Sir:

In accordance with your letter of September 27th, as follows:

> "When I visited your office on Wednesday, Sept. 25th, with Senator William J. Doran requesting an opinion on the legality of a proposed Brentwood, Missouri, police ordinance, you advised that I should make an official request in writing, enclosing therewith copy of the ordinance that the police department is being operated under at present and the proposed new ordinance. I am, therefore, enclosing Ordinance #277 approved the 12th of May, 1936, which is the ordinance under which the police department is being operated at present and copy of Ordinance No. 316 approved April 27th, 1937, which sets up the salaries of the various members of the Police Department and also a copy of the new proposed Police Ordinance.
>
> "I believe this proposed Ordinance to be illegal and on the attached sheets I have set forth various facts and arguments that I believe support the contention that it is illegal. As we discussed, our next Board meeting being Oct. 8th, 1940, I would greatly appreciate it, if it would be possible for you to furnish me with this opinion as early as possible prior to October 8th. * * * "

we are herewith furnishing you opinion and returning to you the copies of two ordinances and the copy of proposed bill for an ordinance.

In order to determine the legality of this proposed ordinance it is necessary to refer to the sections

of the Statutes applicable to a City of the fourth class and consider the proposed ordinance as those sections and the decisions under them affect it.

> "The propositions of law involved and the contentions in behalf of defendant are succintly stated by his attorneys as follows: 'The City of Richland is a City of the fourth class and was incorporated under the statute of this State permitting the same and derived all of its power from Article V of Chapter 84, Revised Statutes of Missouri, 1909; in other words, the above article is the Constitution for the city and the document to which it must look for all of its rights and privileges and from which it must derive all of its power. It can not act except under the provisions of such article, or under the authority of its own ordinance enacted and created by the authority given by such statute.'*****. City of Richland v. Null, 194 M. A. 176, l.c. 177-8.
>
> "Municipal corporations possess only such powers as are granted in express words, or those necessarily incident to or implied in the powers expressly granted. (City of Independence v. Cleveland, 167 Mo. 384, 67 S. W. 216.) And if there is a fair, reasonable doubt concerning the existence of power in the charter of a city, it will be resolved against the city and the exercise of the power denied. 'State v. Butler, 178 Mo. 272, 77 S. W. 560.)" State ex rel v. Wilson 151 M. A. 719, l. c. 726-7."

The sections of the Statutes applicable to the problem are found in Article 8, Chapter 38, Revised Statutes of Missouri, 1929.

Section 6951 authorizes the city to make provision for the election of a Marshall; section 6975 prescribes some of his duties and enumerates the powers of the Marshall.

Section 6920 authorizes the city to make provision for the appointment of a nightwatchman by the Mayor.

Section 6976 furnishes the authority for the Board of Aldermen to make provision for the appointment of additional policemen.

Section 6971 authorizes the city to make provision for the compensation of its officers and further provides that the salary of no officer shall be changed during the time for which he was elected or appointed.

Section 6969 sets the qualifications for the officers with the exception of the Mayor and Aldermen, with whom we are not concerned.

Section 6993 provides an additional duty for the Marshall in the manner of handling the collection of fines.

Section 6974 furnishes the authority for the Board of Aldermen to prescribe the duties, powers and privileges not defined in said Article 8, Chapter 38.

Section 6957 authorizes provision to be made for removal officers.

And Section 7018 is what might be considered as the general welfare section of the chapter. It is as follows:

> "The Mayor and Board of Aldermen of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify, or repeal the same."

The title to the proposed ordinance and the first paragraph of Section 2 indicate that it is the intention to create a new office, that of Assistant Marshall or Chief of Police. There is no authorization for this office. Only the Marshall, nightwatchman and policemen being authorized. The fact is recognized that in the event of inability of the Marshall to perform his duties they must be performed by some one. A reading of the paragraph indicates that it might be the intention merely to provide for one of the regular policement performing the duties of the Marshall in the event of his inability to act. That is within the powers of the Board of Aldermen but not to create a new

office. At no place is authority conferred to create new office.

The third paragraph of Section 2 seeks to delegate to the Public Safety Committee the duty of making rules and regulations for the police department. This is the power and duty of the Board of Aldermen and we find no authority for such a delegation of power.

The third paragraph of Section 3 seeks to make an additional qualification for the office of Marshall. The qualifications prescribed by Section 6969, supra, are, "* * * be qualified voters under the laws and Constitution of this state and the ordinances of the city. * * *". This added qualification is withoug authority of law.

Paragraphs 17, 18 and 19 seek to set up a method of taking care of property which is found. Some of the provisions of these paragraphs are in conflict with the provisions of Chapter 128 Revised Statutes of Missouri, 1929, converning found property.

Paragraph 20 of Section 3 fixes the compensation of the Marshall. By the terms of the ordinance under which the city is now operating the salary of the Marshall is fixed at $1.00 per year and under the proposed ordinance it is fixed at $1980.00 per year. The ordinance under which the City is now operating seeks to take from the Marshall his statutory duties and place them upon an Inspector of Police, this is without authority. It is impossible to tell whether this provision is legal or not for the reason that it can not be determined whether this is an attempt to increase the compensation of the Marshall during his term or merely to compensate him for additional duties. Added compensation for added du ies being within the authority of the Board of Aldermen.

> "We think the question presented by this appeal was ruled adversely to plaintiff's contention in State ex rel Harvey v. Sheehan, 269 Mo. 421, in which we hold (quoting from Syllabus 4: 'An act which enjoins on an officer new and additional duties and provides merely a compensation therefor, is not violative of the provision of the Constitution prohibiting any increase in the pay of an officer during his term of office.'" Denney v. Silvey, 302 Mo. 665 l. c. 671-2.

The first paragraph of Section 4 is subject to the same objection as is the title and the first paragraph of Section 2.

First paragraph, Section 5, in accordance with the authority conferred by Section 6976, supra, seeks to provide for the appointment of additional policemen. It is vague and indefinite. Prior to 1895, when the present act was passed there was no provision for the appointment of additional policemen or assistants to the Marshall. This section requires the Board of Aldermen to set up the method by ordinance and this paragraph of the ordinance is silent on the method, whether by ordinance, resolution, or motion. The use of the word "employ" in the proposed ordinance might result in confusion but in two Missouri cases, Gracey v. St. Louis 213 Mo. 384, l. c. 394-5 and State ex rel v. Truman 64 SW 2d 105, l. c. 107 the words "employ" and "appoint" have been held to the synonomous.

CONCLUSION

It is the opinion of this department that the purpose of the ordinance is within the power of the Board of Aldermen; that in the instance of the attempt to create a new office, that of assistant Marshall or Chief of Police it exceeds the statutory power of the Board of Aldermen; that the method of appointing additional policemen is so vague as to prescribe no method; that the actual duties performed by the Marshall with those prescribed by the new ordinance should be compared in order to determine whether or not the pay as proposed is contrary to the power of the City; that the ordinance seeks to set up mehtod unlawful in part concerning found property.

> "Municipal ordinances, like statutes, may be valid in some of their provisions and invalid as to others. Where the portion of an ordinance which is invalid is distinctly separable from the remainder, and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected and the remainder will stand as valid and operative." 43 C. J. par. 854. 547.

Respectfully submitted.

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(ACTING) Attorney General
WOJ/mc

MUNICIPALITIES: Hannibal cannot license non-resident towel service business.

January 6, 1940

1-15 FILED 43

Hulse & Hulse
Attorneys at Law
Hannibal, Missouri

Gentlemen:

This will acknowledge receipt of your letter of December 30, 1939, and the attached memorandum submitting the following for our opinion:

> "Is the City of Hannibal, under its special charter, authorized to enact, by its City Council, and enforce an ordinance requiring the payment of a license tax by a party who is a non-resident of said city, and who is engaged in carrying on and conducting a business or rendering a service within the city limits of said city of the following character:
>
> He is engaged in renting the use of towels and other articles used in hotels and by private families. He owns these articles and launders them at a place outside of said city and comes within the city limits of said city to deliver and distribute them to his customers at a nominal rental. After such articles have been soiled, he comes around and gathers them up, takes them to his laundry and launders them again, delivering them to his customers in said city, this course being pursued at regular intervals."

Section 6, Laws 1873, p 241 of the special charter of Hannibal is as follows:

"MAY LICENSE, TAX AND REGULATE AUCTIONEERS, MERCHANTS, VEHICLES, ETC. Sec. 6. To license, tax and regulate auctioneers, merchants, retailers, grocers, confectioners, hotels, boarding houses, liquor sellers, circuses, shows and exhibitions for pay, ball and ten pin alleys, hacks, drays, wagons and other vehicles, used within the city for pay, fishmongers, butchers, pistol galleries, wood and coal yards, livery and feed stables, billiard tables, shuffle-boards, bagatelle tables, restaurants or ordinaries, gift enterprises, hucksters, banking associations and corporations, intelligence offices, public buildings, public halls, public grounds, beer houses, patent right dealers, street railroad cars and companies, hackney carriages, omnibusses, and all other vehicles and all other business trades whatever, and fix the rates for carriage of persons, and of wagonage, drayage and cartage of property."

Section 7287 R. S. Mo. 1929 provides:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

This section appears in Chapter 38, Article 12, R. S. Mo. 1929, being specially applicable to cities under special charters. Further in Siemens v. Shreeve 296 S. W. (Mo. Sup) l.c. 418, the court said, "We think this statute (Sec. 7287 supra) applies to all municipal corporations whether under general or special charter."

Thus, if the city of Hannibal has the power to impose a license tax upon the activity described in your memorandum it must be found in Section 6, supra, of the Hannibal charter. No provision of Article 13, Chapter 38, R. S. Mo. 1929, that bears on this question, is applicable to Hannibal, a city of 22,761 population according to the 1930 U. S. census.

Before taking up the immediate problem we desire to eliminate one feature, that is, that the license tax desired to be imposed cannot be upon the motor vehicle used in making delivery of the towels and other articles, unless in conformity with the rules announced in City of Sikeston v. Marsh 110 S. W. (2nd) 1135 (Mo. App); City of West Plains v. Noland 112 S. W. (2nd) 79 (Mo. App), or one of the class of vehicles named in the charter provisions.

The vehicles named in section 6 are: "hacks, drays, wagons and other vehicles, used within the city for pay," and, "street railroad cars * * *, hackney carriages, omnibusses, and all other vehicles." Under the rule of ejusdem generis the phrase "other vehicles" above underlined must be confined in its application to the same class of vehicles specifically named. The vehicles above named are all of the type that is used to transport persons or property for hire. (The section specifically provides that a portion of the vehicles named must be used for pay). The vehicle in question here is not used, as we understand it, to transport persons or property for hire and therefore is not within the class of vehicles the city of Hannibal is authorized to tax under its charter.

By other provisions of Section 6, supra, the City of Hannibal is authorized to "license, tax and regulate * * merchants, retailers * * * and all other business trades whatever * * *." Unless the city has authority under the above quoted provisions of section 6, it does not have the authority to license the activity in question. It is obvious that no other provisions of Section 6 could possibly include this activity.

In City of Ozark v. Hammond 49 S. W. (2nd) 129 (Mo. Sup), the city imposed a license tax on a baking company that sold bread in the city that it manufactured elsewhere. The license was imposed on the theory that the baking company was a merchant. The statute authorized the city to license "merchants of all kinds". The court held the ordinance void because the baking company was not a merchant, defining that word to mean, l.c. 131, "A merchant is one who is engaged in the purchase and sale of goods; a trafficker; a trader." It is clear under this definition that the activity in question here is not that of a merchant. He buys and sells no goods but only sells the use of something owned by himself.

A "retailer" is defined in Great Atlantic & Pacific Tea Company v. Cream of Wheat Co. 227 Fed. 46 as one who "sells to the consumer." In Words & Phrases 3rd Series p. 820, there appears the following: "the word 'retail' meaning to sell in small parcels, and not in gross, to sell in broken parts, and in small lots or parcels, rather than in bulk, and the word 'retailer' meaning one who retails or sells goods in small quantities or parcels. Byron v. City of Sparks 137 p. 522, 523, 36 Nev. 573."

Thus, it appears a retailer has been defined to be one who sells some tangible item of property. In the present activity nothing is sold; no title passes; the towels are only rented and therefore the activity is not that of selling at retail as a retailer.

We now come to the weight to be given to the phrase "and all other business trades whatever," in deciding the question. In Siemens v. Shreeve 296 S. W. 415 (Mo. Sup) the court determined that an architect could not be compelled to pay a license tax under a charter provision that did not name that avocation but that did name "all occupations, professions, trades, pursuits * * * of whatever name or character." The court in the opinion reviews cases wherein licensing under general language had been approved but holds that since the enactment of Section 7287 R. S. Mo. 1929 the license tax imposed upon an architect under such a general classification of avocations could not stand.

CONCLUSION

Therefore, it is our opinion that the city of Hannibal has no authority to license a person, a non-resident of the city, that rents towels and other articles to persons in the city.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

CEMETERIES:
CITIES OF THE FOURTH CLASS: Authority of cities of the fourth class to control cemeteries.

1/26

January 26, 1940

FILED
43

Mr. S. J. Hudson, Chairman
Cemetery Commission
Poplar Bluff, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question based on the following statement of facts:

> "A short time ago we extended our City Limits and took in a Cemetery which before was located in the County. The roads and streets and avenues according to the plat filed were dedicated to the public forever. I would like to know if this Cemetery is now under our control and if we can make ordinances to rule or control it in the same manner that we rule and control our City Cemetery.
>
> "Our City Attorney thinks we have no authority to take control of this Cemetery or pass any ordinances to rule it or have anything to do with it since it is owned by a private company.
>
> "We have an ordinance governing our City Cemetery. I would like to have your opinion on this matter."

Cities of the fourth class are creatures of the statute and it is a well known rule of law that such cities must look to the statutes for their powers and duties.

On the question of the powers and duties of cities of the fourth class in relation to cemeteries, we find that such cities may possess and control cemeteries under Section 7040, R. S. Missouri 1929, which provides as follows:

> "The board of aldermen shall have power to purchase, receive, and to hold real estate, as hereinbefore mentioned, for public cemeteries, either within or without the city, within a distance of three miles thereof, and the city and its officers shall have jurisdiction over the said cemeteries wherever located: Provided, that no such cemetery shall exceed eighty acres in one body. The board of aldermen shall provide for the survey, platting, grading, fencing, ornamenting and improving of all the cemetery ground, and the avenues leading thereto, owned by the city, and may construct walks and protect ornamental trees, and provide for paying the expenses therefor. The board of aldermen may make rules and pass ordinances imposing penalties and fines, regulating, protecting and governing city cemeteries, the owners of lots therein, visitors thereto, and punish trespassers therein, and the officers of such city shall have as full jurisdiction and power in the enforcing of such rules and ordinances as though they related to the city itself."

It will be noted by this section that cemeteries which the city purchases or receives, within the city limit or within a distance of three miles thereof, shall have jurisdiction over such cemeteries and may pass the proper ordinances for the regulation and supervision of them.

By Section 14068, R. S. Missouri 1929, it is provided as follows:

> "Any town, city or village in the state of Missouri may purchase, receive and hold real estate within or outside such city, town or village for the burial of the dead, and may lease, sell or otherwise dispose of the same. And the council of said cities, towns and villages may make rules and pass ordinances imposing penalties and fines not exceeding one hundred dollars, regulating, protecting and governing cemeteries outside of said cities, towns and villages, the owners of lots therein, visitors thereto, and punishing trespassers thereon, to the extent as though such cemeteries were inside the corporate limits of such cities, towns and villages; and the officers of said cities, towns and villages shall have as full jurisdiction and power in the enforcing of said rules and ordinances as though they related to such city, town or village itself."

By comparing these two sections hereinbefore cited, it will be seen that regulation and supervision of cemeteries in cities of the fourth class, or within three miles of the limits thereof, depends on the city purchasing or receiving and holding cemeteries for cemetery purposes. In case a private cemetery or one owned by a cemetery association is within the corporate limits or is brought in by an extension of the boundaries of the city or is within three miles of such city, such cemetery would not be subject to the provisions of the foregoing sections without the owners thereof surrendering possession to the city.

CONCLUSION.

From the foregoing it is the opinion of this department that even though the city limits are extended to include a private cemetery, such cemetery would not come under the control of the city council unless the owners of such cemetery conveyed all of their interests to the city and the city received the same. Therefore, the city has no authority to take control over such cemetery or to pass any ordinances to rule it or to have anything to do with it.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

TOWNSHIP ORGANIZATION - SCHOOL: Township Collector must pay moneys directly to Treasurer of Consolidated School District under Section 9340, R. S. Mo. 1929. Section 12321, R. S. Mo. 1929, discussed.

February 6, 1940

2-7

FILED
43

Honorable M. J. Huffman
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 27, 1940, which reads as follows:

"The tax collector of Pleasant Valley Township in this County, which is under township organization, has asked for my opinion in regard to the disbursing of moneys collected by him, which are due Consolidated School District No. 4 at Mansfield which is in his township.

Inasmuch as Section 9340 of the Revised Statutes of Missouri for 1929 provides that the township collector should pay over to the Treasurer of the Board of Education all moneys received and collected by him, to which said Board is entitled at least once in every month, and Section 12321 of said Statutes provides that the township collector should pay over to the Township Treasurer all school moneys collected by him, I am referring the matter to your office for your opinion in this question.

The township collector of said Pleasant Valley Township has no choice in the matter, but the Consolidated School District is insisting that he turn the

money directly to its Treasurer and it seems to have been the custom and practice of this collector and other collectors before him to turn the money to the Township Treasurer, who then turned it to the Treasurer of the School District. As you can see, the Township Treasurer is drawing a per cent for disbursing the school money to the Treasurer of the Consolidated School District, and the Consolidated School District feels that this is a needless charge on the District.

All the parties concerned are very anxious that this matter be determined. I would appreciate it a very great deal if you will give me your opinion on this matter at your earliest possible convenience."

It will be noted that Article 4, Chapter 57, R. S. Mo. 1929, carries the following title, "Laws Applicable to City, Town and Consolidated Schools". Section 9340 reads as follows:

"The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; and upon such payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education, and the other shall be filed in his settlement with the county court."

From reading the aforesaid section, we find that the legislature designates specifically that the county or township collector shall pay over to the treasurer

of said Board of Education all moneys received and collected by him, which said Board is entitled to at least once each month. The section then goes further and provides that upon taking receipt from the treasurer (of the consolidated school district), the same shall be honored by the county court when he makes his settlements, etc. It is also noted that the legislature had in mind township organization when this section of the statutes was passed, and further, they provided a speedy method for consolidated school districts to receive the money which was coming to them.

Now, turning to Section 12321 of Chapter 86, R. S. Mo., 1929, it will be noted in Article 12 that the title is "Revenue, Assessment and Collection of". The above section reads as follows:

> "To each assessment roll a warrant under the hand of the county clerk and seal of the court shall be annexed, commanding such collector to collect from the several persons named in the assessment roll the several sums mentioned in the last columns of such roll, opposite their respective names; the warrant shall direct the collector, out of the moneys collected, after deducting the compensation to which he may be lawfully entitled, to pay over to the county treasurer the state and county tax collected by him. He shall pay over to the township treasurer all school moneys collected by him, and all moneys collected for township expenses, and all moneys collected for road and bridge purposes."

It will be noted that this section provides that to each assessment roll a warrant under the hand of the clerk and seal of the county shall be annexed. * * * The warrant shall direct the collector, out of the moneys collected, after deducting compensation to which he may be lawfully entitled, to pay over to the county treasurer

the state and county tax collected by him. He shall pay to the township treasurer all school moneys collected by him. * * *

It is our opinion that this section has to do, of course, with the collection of all moneys that are provided in the assessment roll that the collector shall collect in his township, but this is a much older section.

When Section 9340, R. S. Mo. 1929, was passed, the legislature, in our opinion, designated clearly in this section that the township collector, when he collected the taxes, as is provided in Section 12321, should forthwith immediately each month pay the money due the consolidated school district, if there be one in his township, to the treasurer of the consolidated district. It is our opinion that all other school moneys which are not due the consolidated school district should be, under Section 12321, turned over to the township treasurer. In other words, the effect of Section 12321 is that if there is a consolidated school district within the township, the collector pays only the remaining school moneys to the township treasurer, but under Section 9340 he shall pay the moneys going to the particular consolidated school district each month.

In conclusion, it is our opinion that Section 9340, R. S. Mo. 1929, specifically requires a township collector to pay over to the consolidated school district treasury any moneys coming into his hands for the consolidated school district each month, and Section 12321, R. S. Mo. 1929, does not take precedence over Section 9340. The township collector has no right to pay moneys due a consolidated school district over to the township treasury as he should do with other school moneys under Section 12321, R. S. Mo. 1929.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:VC

BURIAL SOCIETIES: The right of burial societies to solicit and receive members over the age of sixty-five years.

March 15, 1940

3-16

FILED
43

Honorable Frank Huffhines
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit a request for an opinion as follows:

> "I have had two complaints from funeral homes on the solicitation for membership by Burial Associations on persons over 65 years of age. The Christian County Association is three years old and they sold a policy to one B. F. Bowling, age 72, who died just recently. His policy was transferred from an old .10¢ burial policy about 1½ years ago. Is this in violation of any statute?"

By your second letter pertaining to this request, I note you state that the Christian County Burial Association was organized under the provisions of Article X, Chapter 32, Revised Statutes of Missouri 1929. You also state in your second letter that the original policy to Mr. Bowling was not issued by the Christian County Burial Association and that that association had no connection with the one which issued the policy. It appears from your original request that the policy which Mr. Bowling had at the time of his death had been transferred by another association to the Christian County Burial Association.

It is a well settled rule of law that burial associations are creatures of the statute and they must look to the statutes for their powers and duties. This is such a general rule that we do not deem it

necessary to cite authorities.

Referring to Article X of Chapter 32, Revised Statutes of Missouri 1929, we fail to find where the Christian County Burial Association was authorized to receive the old burial policy of Mr. Bowling under which insurance is claimed against the Christian County Burial Association.

Section 5014, R. S. Missouri 1929, which applies to such associations, provides as follows:

> "Associations may be incorporated under the provisions of article 10, chapter 32, R. S. 1929, for the purpose of furnishing funeral or burial benefits for their members: Provided, that no such benefits shall exceed the sum of three hundred dollars for the funeral or burial of any one member. Such association when formed shall be exempt from the provisions of the general insurance laws of this state, to wit: Chapter 37, R. S. 1929: Provided, that any such association now in existence may incorporate as provided in this law within ninety days after it shall take effect, and thereafter no such association shall be incorporated, as in this law authorized, until it shall have application for at least three thousand memberships, with at least one month's dues paid on each application: Provided, that no member shall be admitted into any such association who, at his or her last birthday was over age of 65 years, and that the premium or dues collected by every such association shall increase at the same as, or a greater rate than, premiums are increased from 10 years to 50 years: Provided, also, that if any such

> corporation shall receive any member as of any date prior to first day of the month in which such member was actually received, or who shall receive any member at a rate for any other age than the actual age of such member shall be deemed guilty of a misdemeanor and upon conviction punished by a fine of not less than five hundred ($500.00) dollars nor more than one thousand ($1,000) dollars, and in addition thereto, it shall be the duty of circuit judge before whom such case is tried to enter judgment declaring a forfeiture of the charter of the defendant association."

It will be noted by this section that such associations are prohibited from admitting members whose last birthday was over the age of sixty-five. It will also be noted that this section provides a penalty for receiving members at a rate for any other age than the actual age. From the statement which you have submitted, it seems that the company admitted Mr. Bowling into its organization clearly in violation of said Section 5014, R. S. Missouri 1929, because you stated in your letter that Mr. Bowling's age is seventy-two years.

CONCLUSION.

From the foregoing it is the opinion of this department that a burial association, organized under Article X, Chapter 32 Revised Statutes of Missouri 1929, is not authorized to solicit for membership or receive a member into its organization who, at his or her last birthday, was over the age of sixty-five years.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

CRIMINAL PROCEDURE: Application for extension of time made to trial
PERFECTING APPEALS: court in felony cases within six months period.
EXTENDING TIME: If made thereafter, should not be ruled on; should be made in Supreme Court.

September 4, 1940

8-9 FILED 43

Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated June 12, 1940, which is in the following terms:

> "A question has lately arisen regarding interpretation of the above section. The facts are these: appeal was prayed and allowed on Dec. 1, 1939 from conviction of felony; on June 3, 1940, defendant's lawyer prayed the circuit court for an additional three months of time in which to perfect appeal (the six months period had elapsed on June 1, 1940): the trial court refused to hear reasons for extending the time on the ground that, when the first six months time had elapsed, the trial court had lost all jurisdiction of the case and the Supreme Court was the proper place to apply for the extension of time.
>
> The files have never left the trial court; the transcript of testimony has not been completed so the bill of exceptions has never been filed for transmissal to the Supreme Court.
>
> I should like the opinion of your office as to whether or not the trial court retains jurisdiction of the case under the

circumstances."

The question is whether an application for extension of time to perfect an appeal in a felony case may properly be sustained by the trial court where such application was made more than six months after the appeal was granted.

Section 3761 R. S. 1929, Mo. St. Ann. page 3301, as amended Laws 1939, page 358, Section 1, provides:

> "If any person taking an appeal to the Supreme Court on conviction for a felony, other than those wherein the defendant shall have been sentenced to suffer death, shall fail to perfect the appeal within six months from the time the appeal is granted, unless good and sufficient cause for not perfecting his appeal be shown to the trial court, for which reason the trial court, or the judge of the trial court in vacation, may extend this time for the period of ninety days, the Attorney General may file his motion before the Supreme Court asking that the appeal may be dismissed, whereupon the Court shall make an order that the appeal be dismissed, unless the defendant shall show to the satisfaction of the Court good cause for not perfecting his appeal." (Underlining ours)

The clause underlined above first appeared in said Section 3761 in the amendment thereof in Laws 1939, page 358, Section 1. The question regarding said clause which is considered here has not been adjudicated.

It might be argued that the said application may be made to the trial court at any time within nine months after the appeal was granted, on the ground that said Section 3761 fails to provide specifically any limitation on the time within which the application must be made.

The nine months period, it might be argued, could be based on the circumstance that the trial court under the statute could extend time for perfecting an appeal to that extent. In construing statutes, the purpose always is to ascertain the intent of the legislature (State vs. Naylor 40 S. W. (2nd) 1079, 328 Mo. 335). In doing this, "the results and consequences of any proposed interpretation of the statute may properly be considered as a guide as to the probable intent of the lawmakers . . ." (Bragg City Special Road District vs. Johnson 20 S. W. (2nd) 22, 323 Mo. 990, l.c. 999, 66 A.L.R. 1053).

The construction above mentioned would make it possible, six months after an appeal was granted, for a motion to dismiss an appeal to be pending in the Supreme Court, and a motion for extension of time to be pending in the trial court, both at the same time. To the extent that the sufficiency of the reasons for failure to perfect the appeal would be drawn in question, the same controversy would be pending before both courts at the same time in the same case. This would undoubtedly produce confusion in the administration of the law. It is a guiding principle of statutory construction that "a construction should never be given to a statute . . . which would work such confusion, unless no other reasonable construction is possible." State ex rel and to use of Jamison vs. St. Louis-San Francisco Ry. Co. 300 S. W. 274, 318 Mo. 285.

The first above mentioned construction would also make it possible, six months after an appeal was granted, for the Supreme Court to dismiss an appeal on one day, and the trial court to order an extension of time on the following day. In that situation, the appeal having been dismissed by the Supreme Court pursuant to statutory authority, the action of the trial court would be useless. It has been ruled by the Supreme Court that "the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable." State ex rel Norvell Shapleigh Hardware Co. vs. Cook 77 S. W. 559, 178 Mo. 189, l.c. 193. We believe the intention of the legislature is not consistent with the above mentioned construction, and that such construction should be rejected on the above cited authority.

It might also be argued that the application may properly be made to the trial court within nine months after the granting of the appeal, if made before the Supreme Court has dismissed the appeal. This also would be uncertain and tend to produce confusion; we believe the following points and authorities show that it should be rejected.

We believe the legislature intended that after the six months period has expired, the trial court should take no action on applications thereafter filed, and that it intended that after the six months period expired, the reasons for not timely perfecting the appeal should be presented to the Supreme Court. This interpretation may be rested upon the inclusion in the statute of the provision for presenting to the Supreme Court the reasons for not perfecting the appeal, after the expiration of the six months period, in the words "unless the defendant shall show to the satisfaction of the (Sup.) Court good cause for not perfecting his appeal." (parenthesis ours).

It is a rule of statutory construction that the inclusion in a statute of one thing, or method of procedure, is the exclusion of another (State ex rel Barlow vs. Holtcamp (Mo. Sup) 14 S. W. (2nd) 646; Dietrich vs. Jones 53 S. W. (2nd) 1059, 227 Mo. App. 365), and, that where the statute "directs the performance of certain things in a particular manner . . . it implies that it shall not be done otherwise * * * ." 59 C. J. page 984, Section 582.

Under the last mentioned construction, the appellant is not left without a remedy. He can perfect his appeal as soon as possible after the expiration of the six months period, and show to the Supreme Court good cause for not timely perfecting his appeal. The practice of extending time for perfecting appeals, by order of court on sufficient showing in a proper case, has long prevailed in the Supreme Court. We believe it is not too much to require that the application to the trial court for extension of time be made before the six months period has expired. This interpretation of the statute appears to be consistent with the theory of appellate practice that there should be an orderly proceeding from the trial court to the appellate court; that there should

be a definite line of demarcation between the end of the litigation in the trial court and the commencement of the proceeding in the appellate court.

In fairness it would seem to be proper for the trial court to rule on an application for extension of time after the expiration of the six months period, where such application was made within such six months period.

CONCLUSION

On an application made after the expiration of the six months after an appeal shall have been granted in a felony case, the trial court has no jurisdiction to extend time for perfecting the appeal. The application to the trial court for extension of time should be made within the six months period (provided by Section 3761 R. S. 1929 as amended Laws 1939, page 358, Section 1) for perfecting such appeal. If that is not done, then good reason for not timely perfecting the appeal should be shown to the Supreme Court as grounds for overruling a motion to dismiss, and extending time for perfecting the appeal.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RT

ELECTIONS: VILLAGES: Board of trustees may determine qualifications, election and returns of members.

April 13, 1940.

H-17

FILED
44

Mr. A. B. Ideson
Member Board of Trustees
Village of Oakland, Missouri

Dear Sir:

We are in receipt of your letter of April 9th, wherein you state as follows:

"On Tuesday, April 2, there was an election held in the Village of Oakland for five trustees for the governing Board of that Village.

"There were eight names on the election ballot. After the election, it was discovered that one of the five members receiving the largest number of votes was not qualified to hold office, as he had not been a resident of the Village for a year, as required by the statutes.

"Last night at a meeting of the old Board, which was to have ended its term, a petition was presented by citizens asking this man's disqualification. The man admitted that he had lived in the Village less than a year and pleaded complete ignorance of the fact that he was not qualified.

"The question then arose as to whether or not the qualified candidate receiving the next largest number of votes should be seated. An attorney present would not give us an opinion and it occurred to me that you might be kind enough to straighten us out on the legal points involved.

"If you will be good enough to give us your opinion, at your earliest convenience, and straighten us out in this matter, we will appreciate it very much indeed."

Section 7092 R. S. Mo. 1929, provides that the corporate powers of every village are vested in a board of trustees consisting of five members:

"The corporate powers and duties of every village so incorporated shall be vested in a board of trustees, to consist of five members, unless such town shall contain more than twenty-five hundred inhabitants, in which case such board shall consist of nine members; the first board of trustees shall be appointed by the county court at the time of declaring such town incorporated, who shall continue in office until their successors are elected and qualified; and such successors shall be chosen by the qualified electors residing in such town on the first Tuesday of April in every year in the manner hereinafter provided."

Section 7093 R. S. Mo. 1929, provides that no person shall be a trustee who has not resided therein for one whole year next preceding. It is further provided that every trustee holds his office for a term of one year and until a successor is elected and qualified.

"No person shall be a trustee who shall not have attained the age of twenty-one years; who shall not be a male citizen of the United States; who shall not be an inhabitant of the town at the time of his election, and reside therein for one whole year next preceding; who shall not be a householder within the limits of such town; and every trustee shall hold his office for the term of one year, and until a successor is elected and qualified."

You state that after the election it was discovered that one of the five members receiving the largest number of votes was not qualified to hold office as he had not been a resident of the village for one year.

Mechem on Public Officers Section 130, page 65 declares that:

> " * * * the failure of the newly elected or appointed officer to qualify by law would not, where by law his predecessor held over until his successor was elected and qualified, create a vacancy * * * "

See also Langston v. Howell County 336 Mo. 444, 79 S. W. (2d) 99 l. c. 102.

There being no vacancy (Section 7135 R. S. MO. 1929) in the board, and the trustees serving until their successors were duly elected and qualified (Section 7093 R. S. Mo. 1929), the question would then arise which of the five trustees was to continue in office inasmuch as Section 7141 R. S. 1929, provides that the duly qualified persons receiving the highest number of votes shall be declared duly elected trustee:

> "The election shall be kept open from seven o'clock in the forenoon until six o'clock in the afternoon. After the election is closed, the judges shall examine the ballots, and the duly qualified persons who shall have received the highest number of votes shall be declared duly elected trustees."

The judges of election could only declare the duly "qualified" persons receiving the highest number of votes as duly elected trustees. Does their mistake, although no fault of their own, control the results of the election?

20 C. J. Section 262 page 204 provides that:

> "Inasmuch as the duties of the canvassing boards, except as to determining the genuineness of the returns, are generally regarded as merely ministerial, the omissions or mistakes of such boards can have no controlling influence on the election."

Section 7096 R. S. Mo. 1929, provides that:

> "The board of trustees shall judge of the qualifications, elections and returns of their own members, and determine contested elections; * * * "

From the foregoing we are of the opinion that the board of trustees having determined that one of the five members receiving the largest number of votes was not qualified, the board may then select the qualified candidate receiving the next largest number of votes as one of the five duly elected trustees.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting) Attorney General

MW/mc

ELEEMOSYNARY INSTITUTIONS: Board of Managers not liable for torts of its agents. Superintendent liable to patient for property entrusted where lack of reasonable care is exercised.

January 4, 1940 1/5

FILED 45

Mr. W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We are in receipt of your recent letter wherein you state as follows:

> "I enclose you herewith some correspondence with reference to a claim of $79.50 by two attorneys, Harry W. Durall and R. R. Greenlee, for a tweed coat which a patient brought with her to St. Joseph, and it was delivered to her husband and a receipt taken there for.
>
> Our Board would like to have an opinion from your office as to what we should do with reference to this claim."

A letter from Mr. Harry W. Durall, under date of October 2, 1939, states as follows:

> "I wrote to the St. Joseph Hospital No. 2, sometime ago, relative to claim of Irene Ware, but am informed that I should take the matter up with you.
>
> Mrs. Ware was confined in the St. Joseph Hospital No. 2, in July, 1938, and while there some unauthorized person was allowed to take away from the hospital her coat, described as a Brown Londoner Tweed coat, Shagmore Racoon collar, of the value of $79.50.

> This coat was given to this party by the agents of the Hospital, without her consent or authorization, and while in their possession.
>
> She is therefore claiming damages to the amount of $79.50, for which she asks to be reimbursed."

Dr. Ralf Hanks, Superintendent of State Hospital No. 2, replied to the above letter as follows:

> "In response to your letter of October 17th regarding a coat which was brought to the hospital by Irene Ware, this coat was taken from the hospital by her husband, Charles C. Ware, on July 9th, 1938.
>
> Mr. Ware signed a receipt to the hospital for the receipt of same."

Under date of October 25, 1939, Mr. Durall again wrote:

> "I have your letter of the 23rd, and thank you for your courtesy in this matter.
>
> I also have a letter from the hospital at St. Joseph, in which they admit having given this coat to a Charles Ware, purporting to be the husband of Irene Ware, and therefore I assume they claim they are not liable.
>
> This claimant's name is Irene Boyd, and she states she never was married to Charles Ware, who incidentally has a very checkered career.
>
> Mrs. Boyd, or Ware, was inducted in the hospital by her brother, and did not herself give the name of Ware. She does

admit, during her demented condition, having lived with or cohabited with Mr. Ware.

There could be no reason for letting Mr. Ware have this coat, except to make away with it as he evidently did. And he had nothing to do with having Mrs. Boyd placed in the asylum.

Mrs. Boyd was restored to sanity sometime the first of this year. Even if Ware was her husband, under the circumstances I do not see how they can escape liability, after giving him this coat."

59 C. J., Section 337, page 194, in discussing the liability of the state, declares that:

"A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, * * * * *"

In further discussing the liability of a state agency, it is pointed out (Section 340, page 196) that:

"An action against a state agency or instrumentality is an action against the state * * * * *"

We have examined the laws governing State Eleemosynary Institutions, and find no statute wherein the state has made itself subject to liability for the torts of its officers and agents.

We are therefore of the opinion that neither the state nor the Board of Managers of the State Eleemosynary Institutions would be liable for the loss of the patient's coat.

Whether the superintendent would be personally liable for the loss of the coat under the facts presented depends upon a showing being made that he failed to exercise reasonable care under the circumstances.

In the case of Worsham v. Votgsberger, 129 S. W. 157, l. c. 159, One Hundred Forty Dollars ($140.00) was found on the person of the plaintiff when he was received at the State Lunatic Asylum. This was placed in a safe and entered upon the books of the institution as a credit to the plaintiff. On the following day, plaintiff's sister appeared at the asylum and asked Dr. Worsham, the superintendent and defendant in the case, if the plaintiff had any money, and stated that someone had stolen One Hundred Forty Dollars ($140.00) out of the house. Dr. Worsham informed her that amount had been taken from the plaintiff, and turned it over to her, taking a receipt. A judgment was awarded in favor of plaintiff, and, upon appeal, was affirmed.

The court, in its opinion, stated:

> "It is a well-settled rule of law that, while a ministerial officer in possession of property lawfully received is not an insurer of its safety, he is required to exercise reasonable and ordinary care and diligence to keep and preserve it, in order that it may be restored to the person entitled to it or disposed of in the manner directed by law. Mechem on Public Officers, Section 760."

In the case of St. Joseph Fire and Marine Insurance Company v. Leland, 90 Mo. 177, l. c. 182, the court said:

> "The right of action against a ministerial officer for a violation or neglect of duty by one injured in consequence thereof is a different matter. The common law gave the party aggrieved an action against the officer in such case."

Whether the superintendent exercised reasonable care under the facts presented in disposing of the property, would be a question for a jury to pass on, and we do not herein rule on same. Suffice to say that it is the opinion of this department that while superintendents of state hospitals are not insurers of the property of their patients, they are charged with the exercise of reasonable care in preserving it for restoration to the persons entitled thereto, or for disposition as directed by law.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:VC

PENAL INSTITUTIONS: (Supplemental) The Record Clerk of the penitentiary must follow the law in classifying the prisoner for service of two sentences, one of which was for the conviction on a case while a convict.

January 12, 1940.

1-15

FILED 45

Hon. Lamkin James
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This will acknowledge receipt of your request for a further opinion under the facts stated in an opinion rendered by this office on September 13th, 1939, to you in regard to concurrent and consecutive sentences. We are herein enclosing a copy of that opinion, which is made a part of this supplemental opinion.

Section 12969 R. S. Missouri, 1929, reads as follows:

> "The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: * * "

The above section makes it mandatory for a court to sentence a convict who has committed another crime so that the sentences must run consecutively and not concurrently.

We are referring you to the case of Lee v. Gilvan, 229 S. W. 1045, where the facts are exactly the same state of facts as exists in your former request. The facts were as follows:

> "The petitioner states that he is unlawfully detained in the penitentiary; that he was convicted of a felony in the circuit court of Jackson county, August 2, 1915, and sentenced to a term of five years in the penitentiary; that on April 24,1917, he was paroled by the Governor; that on October 8, 1917, he was convicted of a felony in the circuit court of Jasper county, and sentenced to a term of five years in the penitentiary, and was received there on November 13, 1917; that on November 20, 1917, the Governor revoked his parole; that on December 28, 1920, the prison authorities discharged him under the merit system from the Jasper county sentence, but are now illegally restraining him under the Jackson county sentence aforesaid; that upon the revocation of his parole said sentences became concurrent and he is now entitled to his discharge. * * * "

The court in this case said:

> "By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. Certain it is

> that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative.
>
> "This was the conclusion reached in Ex parte Allen, 196 Mo. 226, 95 S. W. 415. In that case, after Allen had been convicted and while he was being held in the county jail awaiting removal to the penitentiary, he committed another felony, for which he was tried, convicted, and sentenced. At the expiration of the period of the first sentence, he sought to be released on the ground that the sentences were concurrent. In an opinion by Judge Gantt, this court held that the case came within the provisions of section 2383, R. S. 1899, now section 2292, and that the sentences were cumulative."

Section 2292 referred to in the above quotation is now Section 12969 R. S. Missouri, 1929. In that case the court referring to this particular section specifically held that the sentence of a convict shall not commence to run until the expiration of the sentence under which he is held. The court in this case also held that a prisoner under parole is under sentence and if convicted of another offense sentences are cumulative, that is consecutive and it is mandatory upon the court to have the sentences run consecutively.

In order for us to change the opinion herein enclosed, dated September 13th, 1939, we would be compelled to find a case overruling the case of Lee v. Gilvan, supra.

CONCLUSION

In view of the above authority, Lee v. Gilvan, it is still further the opinion of this Department that the warden of the penitentiary, through the record clerk, should follow the order of sentence as set out in Section 12969, supra, under the record as set out in the two separate commitments under the two separate sentences of the trial court. The fact that the trial court should state in the commitment that the sentences on the two different charges should run concurrently is of no effect and in violation of Section 12969, supra, but that the comment in the two commitments does not invalidate the commitments in total. The two commitments on their face show that on the first charge the defendant was a convict and comes within Section 12969, on the commitment under the second charge.

APPROVED:

Respectfully submitted,

TYRE W. BURTON
(Acting) Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

ELEEMOSYNARY INSTITUTIONS: State Eleemosynary Institutions must accept indigent insane who are certified under Sections 8652 and 8652a.

February 8, 1940

2-9

FILED
45

Mr. W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 2, 1940, which reads as follows:

"The following telegram was received January 27th:

Hon. W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions

Due to crowded conditions officials City Sanatorium advise something must be done immediately. Would it be possible for you to hold meeting your Board in St. Louis in near future together with Director of Public Welfare Hospital Commissioner and Sanatarium Officials so problem can be discussed in hope of reaching satisfactory solution. I would very much appreciate your cooperation. Sincerely

Bernard F. Dickmann, Mayor.

Complying with this request, a joint meeting of the above mentioned officials of St. Louis City and the Eleemosynary Board will be held in St. Louis, Sunday, February 11th.

In view of the fact that the State appropriated $600,000. (Section 62, page 135, Laws of Missouri, 1939)

would it be considered an obligation or just a favor on the part of the Board of Managers of the Eleemosynary Institutions to accept patients from the City of St. Louis into the four state mental hospitals?

I respectfully request an official opinion from you upon the above question before any negotiations are begun.

It would seem advisable at this time to call your attention to the fact that the primary purpose of the building program at the State hospitals was to alleviate the very serious and dangerous overcrowded conditions. With the constant and increasing demands from the 114 counties of the State for admission of county patients to the mental hospitals, the situation is gradually developing toward overcrowding again. Should not this condition be considered in the discussion of this matter between our Board and the St. Louis authorities?"

Section 8652, R. S. Mo. 1929, (Mo. St. Ann., Section 8652, page 7747) reads as follows:

"Whenever an inmate of a private or public charitable institution for the maintenance and care of indigent persons shall become insane, a citizen of the county in which such institution is located may file in the county court thereof, and with the clerk of said court, a statement in writing substantially complying with the form set forth in section 8643, R. S. 1929, and shall in addition thereto allege in said statement the county in this state of which said insane person was a resident next prior to his admission to said charitable institution. The clerk of the county

court in which such statement is filed shall proceed therewith as provided in section 8644, R. S. 1929, and shall forward to the clerk of the county court of the county of which said insane person is alleged to have been a resident next prior to his admission to said charitable institution, a copy of such statement and notice of the place and time when said statement will be presented to the court, which shall not be less than twelve days after the notice is deposited in the mail as hereinafter provided. The copy of said statement and said notice shall be placed in a well-secured envelope, directed and addressed to the clerk of the county court of the county to whom the same is herein required to be forwarded, deposited in the postoffice, postage prepaid, and registered in accordance with the postal laws of the United States of America; the return of such service shall be indorsed on a copy of the notice of the matters therein contained, and shall confer complete jurisdiction upon the court in which the statement is filed to hear and determine the same. Said county court shall hear said matter on the date mentioned in said notice or upon any day to which said court shall adjourn or continue the hearing thereof, in the manner now provided for resident insane persons. If the person charged shall be found by the court to be insane and indigent and to have been a resident of the county alleged in said statement next prior to his admission to said charitable institution, its judgment shall entitle said person to admission to the asylum upon the same terms as resident insane and indigent persons, and the county of which

such insane person is found to have been a resident next prior to his admission to such charitable institution shall pay all costs and expenses and provide all things required by this article, the same as if said person had been sent to the asylum as an indigent insane person by order of the county court of the county of which he is found to have been a resident next prior to his admission to said charitable institution."

Section 8652a, Mo. St. Ann., page 7748, reads as follows:

"All of the duties imposed upon the county court or the clerk thereof, and all of the power conferred upon the county court or the clerk thereof, by this article, except as hereinafter mentioned, shall be imposed upon, and shall be exercised by, the hospital commissioner or the assistant hospital commissioner of the city of St. Louis in like manner and with like effect as if said powers had been exercised by the county court or the clerk thereof; provided that any certificate which the county clerk may be by law required to transmit to the superintendent of a state hospital shall, in the case of the city of St. Louis, be signed and transmitted by the comptroller of said city; provided further, that the authority conferred on the county court to discount and sell warrants to defray the costs of maintaining the insane poor in a state hospital, and all other powers and duties of a fiscal nature, so far as they relate to the city of St. Louis, concerning the admission of the indigent insane into a state hospital, and their maintenance therein, are hereby conferred upon the comptroller of said city. When the hospital commissioner or the

> assistant hospital commissioner, after a hearing, shall make an order setting forth that a person found to be insane is a fit subject to be sent to a state hospital, and naming the hospital, said hospital commissioner or his assistant may, without further hearing, make supplemental orders authorizing the commitment of such insane person to any other state hospital to which such insane person may be lawfully committed, or authorizing the commitment of such insane person to the city sanitarium of the city of St. Louis, or any other institution maintained by said city for the care of the indigent insane. The powers hereby conferred upon the officers of the city of St. Louis are cumulative, and this act shall not be so construed as to deprive the city of St. Louis of the power to enact appropriate ordinances for the commitment of indigent insane persons or pay patients to its sanitarium, or other institutions maintained by said city for the care of insane persons, and prescribing the proceedings for such commitment."

Section 1, Laws of Missouri, 1931, page 221, reads as follows:

> "Any county or city in this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to $8.00 per month per patient, upon proper report filed and sworn to by superintendent or surgeon in chief of such hospital for the insane, when such proper report is filed with the state eleemosynary board. Such reports shall be filed quarterly and shall show name, address and other

necessary data so as to properly identify and authenticate the patients of such insane institution."

Section 62, Laws of Missouri, 1939, page 135, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Six Hundred Thousand ($600,000.00) Dollars or so much thereof as may be necessary for the purpose of paying to mental hospitals, established and maintained by any county or city not within a County in this State, the sum of Eight Dollars ($8.00) per month for each indigent insane person, detained and treated in any such hospital, pursuant to the provisions of an Act approved May 12th, 1931, Laws 1931, Page 221, entitled "An Act to Provide Partial Support for Counties or Cities Maintaining Approved Hospitals for the Insane;" Provided that the State Auditor shall not audit, and the State Treasurer shall not pay any claim out of this appropriation unless such claim has first been approved by the President of the Board of Managers of State Eleemosynary Institutions."

It is the opinion of this department that the legislature, in Section 8652, made it mandatory upon the state to accept indigent insane persons from the City of St. Louis, for the statute in this section reads as follows:

"* * * * * If the person charged shall be found by the court to be insane and indigent and to have been a resi-

> dent of the county alleged in said statement next prior to his admission to said charitable institution, its judgment shall entitle said person to admission to the asylum upon the same terms as resident insane and indigent persons, * * * * *
> (Italics ours)

This section should be read in connection with Section 8652a in which it will be noted that the legislature, in passing said section, passed it with the specific intention of alleviating the cumbersome method of procedure as set forth in Section 8652.

Section 8652a provides that:

> "All of the duties imposed upon the county court or the clerk thereof, and all of the power conferred upon the county court or the clerk thereof, by this article, except as hereinafter mentioned, shall be imposed upon, and shall be exercised by the hospital commissioner or the assistant hospital commissioner of the city of St. Louis in like manner and with like effect as if said powers had been exercised by the county court or the clerk thereof; * * * * * and all other powers and duties of a fiscal nature, so far as they relate to the city of St. Louis, concerning the admission of the indigent insane into a state hospital, and their maintenance therein, are hereby conferred upon the comptroller of said city."

By this section, the legislature has clearly set up a supplementary procedure for the City of St. Louis other than that which is provided for the several counties of Missouri, and, in interpreting Sections 8652 and 8652a, we think the legislature clearly intended and imposed the direct duty upon the Board of Supervisors

provided for in Section 8561, R. S. Mo. 1929, to accept persons who are certified in accordance with Sections 8652 and 8652a, Mo. St. Ann., from the City of St. Louis.

Now, turning to the portion of your question which makes reference to Section 1 of the Laws of Missouri, 1931, and Section 62 of Laws of Missouri, 1939, it is the opinion of our department that the legislature, in Laws of Missouri, 1931, merely provided for partial state support for inmates of hospitals maintained by cities or counties, provided said hospitals meet the necessary qualifications as to management, facilities and medical supervision. The section also provides that any such hospital meeting with the requirements shall be entitled to $8.00 per month per patient, which, in our opinion, applies to cities and counties alike.

Section 62 of the Laws of Missouri, 1939, merely sets up an appropriation of $600,000.00 to take care of these $8.00 per month patient payments that may be paid out to the several institutions of the state which can meet the requirements and are entitled to this sum of money, as is provided in Section 1 of the Laws of Missouri, 1931, at page 221. It is our opinion that Section 62 in nowise has any effect on the question of whether or not the State Eleemosynary Institutions are or are not required to accept indigent insane persons from the City of St. Louis and is merely an appropriation section as will be noted from the title in the statutes of Missouri.

In conclusion, it is our opinion that the State Eleemosynary Institutions, as are defined in Section 8650, R. S. Mo. 1929, are required to accept patients certified in accordance with Sections 8652 and 8652a, Mo. St. Ann., from the City of St. Louis.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:VC

PENSIONS, BLIND: The Commission may accept bequests, and how same may be expended.

May 29, 1940

6-1

FILED
45

Honorable W. Ed Jameson
President Board of Managers
State Eleemposynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This will acknowledge receipt of your request for an official opinion under date of May 14, 1940, and supplemental letter of May 24, 1940, which read as follows:

> "I wish you would please note the enclosed correspondence and, if possible, let me have an opinion from your department at an early date, as it will likely save the tax on a $5000. bequest made by Mrs. Sarah L. G. Wilson, St. Louis, to the Missouri Commission for the Blind.
>
> "You will note a letter from H. B. Green, who is president of the Industrial Aid for the Blind, Inc. in St. Louis, claiming this bequest was a technical error in the will and that they feel satisfied that Mrs. Wilson had in mind bequeathing this money to the Industrial Aid for the Blind.
>
> "As chairman of the Missouri Commission for the Blind, I do not feel I can answer this letter until I have an opinion from your office."

"Supplementing my letter of May 14, 1940 relative to the bequest of $5,000.00 to the Missouri Commission for the Blind, I shall appreciate if you will advise whether this bequest can be received by the Commission; whether the Commission can hold same, or if it has to be placed in the State Treasury.

Also if you will favor us with your opinion as to whether the Commission, if permitted to accept and hold this bequest, can use same in the performance of its duty of investigating applications for blind pensions and for such purpose as the expense of employment of case workers, travel expense of workers, office workers of the Pension Department and other expense, such as postage and stationery and so forth, all incidental to the investigation of applications for pension a duty imposed on the Commission by Section #8898 R. S. Mo. 1929."

In regard to your former inquiry, relative to whether the Commission for the Blind shall receive the bequest or the Industrial Aid for the Blind, Inc., as a guide in determining who is entitled to this bequest, we must look to the will itself. The provision specifically bequeaths $5,000.00 to the Missouri Commission for the Blind. We fail to find any ambiguity in this part of the will. Apparently it was the intention of the testator that the Commission for the Blind shall receive the $5,000.00 bequest.

C. J. Vol. 69, p. 52, Section 1118, lays down the general principle of law in construing wills and the courts of this state follow it. This reads in part as follows:

> "If a will sets forth the intention of the testator in clear and unequivocal language there is no occasion for judicial interpretation; * * * * * *."

Also, in Vol 69 of C. J. at page 42, Section 1110, we find:

> "While the appropriate court has power to interpret and construe a will, its function is judicial and administrative, not legislative or creative. Stated otherwise, the court's function is to construe a will, not to make or rewrite one for the testator under the guise of construction, even to do equity or accomplish a more equitable division of the estate, or for the purpose of making it more liberal and just, or even though interested parties are agreeable thereto. Nor can the will be changed either by the court, through construction, or by the parties before the court, by admission or agreement or stipulation, although parties who are sui juris may make an agreement with each other with regard to their respective interests under the will. The court cannot pass on the wisdom of provisions of a will. Where there is any uncertainty or ambiguity in a will it is proper for the court to resort to or take into consideration the established rules for the construction of wills. On the other hand, since the purpose of construing and interpreting a will is to ascertain the intention of the testator as expressed in the will, where such intention is expressed in the will in clear and unequivocal language, there

> is no need for judicial construction and interpretation, and it should not be resorted to or permitted.* * * * * *"

Therefore, without going into the matter further it unquestionably was the intention of the testator in this particular instance that said bequest for $5,000.00 was for the Commission for the Blind.

You further inquire can the Commission for the Blind receive this bequest. We answer this in the affirmative.

Section 8890 R. S. Mo. 1929, reads as follows:

> "Said commission is authorized to receive and use for the purposes hereinbefore enumerated, or any of them, donations and bequests, and is authorized to expend such donations and bequests in such manner as it may deem proper within the limitations imposed by the donors thereof."

The above provision has not been repealed.

You also inquire if the Commission can hold same or does the Commission have to place same in the state Treasury. In this state we have a constitutional provision which provides that all revenue collected and moneys received by the state shall go into the Treasury.

Section 43 of Article IV of the Constitution of Missouri reads as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

"First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.

"Second, For the benefit of the sinking fund, which shall not be less annually than two hundred and fifty thousand dollars.

Third, For free public school purposes.

"Fourth, for the payment of the cost of assessing and collecting the revenue.

"Fifth, For the payment of the civil list.

"Sixth, For the support of the eleemosynary institutions of the State.

"Seventh, For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums

> necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

However, our courts have construed revenue as used in the constitutional provision to mean money received from taxation, or current incomes which is subject to appropriation by the Legislature.

In State v. Board of Regents, 264 S. W. 698, l. c. 698-699, the court defined revenue collected and money received by the State from any source whatsoever as follows:

> "This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses."

In the same case the court held that the Board of Regents for Northeast Missouri State Teachers College was not the state and that money received by it other than appropriation was not state money. In this case the Board had insured the buildings a ainst a fire with money derived from the Board charging certain student fees. There was no statutory provision for assessing such a fee.

One of the buildings caught fire and burned. The insurance paid the Board of Regents, who were the beneficiaries, and the Board immediately set about restoring the building with the insurance money, where

mandamus proceedings were instituted to compel the payment of the insurance money into the State Treasury. As previously stated, the court held the Board was authorized to rebuild with the insurance money without placing same in the State Treasury and receiving an appropriation for such expenditures.

In view of the above and foregoing, it is the opinion of this Department that such a bequest shall not be placed in the Treasury of the State.

The Fifty-seventh General Assembly passed the following provision on page 415, Laws of 1933:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by

> the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

The above provision specifically makes an exception of gifts, and does not require that gifts be placed in the State Treasury. However, this provision does require that said gifts shall be reported in detail quarterly to the Governor and biennially to the General Assembly.

You inquire if this bequest may be used to employ case workers to investigate applications now pending for blind pensions, traveling expenses, etc., incidental to the investigation of applications.

Section 8890, supra, authorizes the Commission to receive such a bequest and use same for the purposes hereinabove enumerated and is further authorized to expend such donations and bequests in such manner as it may deem proper within the limitations imposed by the donor.

Section 8889 R. S. Mo. 1929 in part reads as follows:

> "The duties of said Commission shall be to prepare and maintain a complete register of the blind persons within this state and to collate information concerning their physical condition, cause of blindness and such additional information as may be useful to the Commission in the performance of its other duties as herein enumerated, * * * * *"

In view of Section 8890 and 8889, supra, it is the opinion of this department that such a bequest may be used for the employment of workers to investigate applications for blind pensions now filed with the Commission for the blind.

CONCLUSION

It is, therefore, the opinion of this Department that the Commission for the Blind, whose duties have now been transferred to the members of the State Eleemosynary Institutions under Section 8888 R. S. Mo. 1929, as amended by the Fifty-seventh General Assembly, p. 190, Laws of 1933, is authorized to receive this bequest for Five Thousand ($5,000.00) Dollars, and that same shall be reported to the Governor and the General Assembly but said bequest does not have to be placed in the State Treasury.

Furthermore, this bequest may, in the absence of any special request by the donar as to how same shall be used, be used to employ case workers to investigate applications for blind pensions now filed with the Commission.

Yours very truly,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General
ARH/rv

COUNTY COURT: Judges not entitled to mileage when they sit as members of the county board of equalization.

8/20

August 17, 1940.

FILED 45

Mr. Lamkin James, Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 2nd, wherein you state as follows:

"The County Court has asked that I write you for your interpretation of Section 9818 R. S. Mo. 1929, relating to compensation of members of the Board of Equalization, and Section 2092, as Amended Laws, 1939, Page 332, relating to compensation for Judges of the County Court.

"In accordance with Section 2092, Laws 1939, Judges of the County Court in counties having less than 75000 inhabitants, receive five (5¢) cents per mile for each mile necessarily travelled in going to and returning from the place of holding County Court. Saline County is a county having over 30000 and less than 75000 inhabitants.

"As members of the County Board of Equalization, the judges of the County Court receive $5.00 per day for each day they shall act as members of the County Board of Equalization, in accordance with Section 9818, R. S. Mo. 1929.

"They desire your opinion as to whether they are entitled to receive mileage provided for in Section 2092, supra, for the days they are sitting as Judges of the County Court on

the Board of Equalization. They are of the opinion that inasmuch as they are required to sit as Judges of the County Court on the Board of Equalization, that they are performing a duty of the Judges of the County Court and as such, should receive mileage provided for under Section 2092, Laws '39."

"I would very much appreciate your opinion."

According to your letter Saline is a county having over 30,000 and less than 75,000 inhabitants.

Laws of Mo. 1939, Section 2092, Page 332, 333, provides for compensation and mileage to judges of the county court:

"In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929. In all counties of this state now or hereafter having ninety thousand inhabitants and less than one hundred fifty thousand inhabitants, the judges of the county court shall receive an annual salary of three thousand dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, as provided by section 7894. In all counties of this state now or hereafter having one hundred fifty thousand inhabitants, and less than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of forty-five hundred dollars. Said

salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892 R. S. 1929, and in lieu of all other fees, compensation, or salaries, heretofore allowed by law to said judges, except the per diem as allowed to said judges as members of the board of equalization and board of appeals. In all counties of this state now or hereafter having more than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of four thousand eight hundred dollars. Said salary of four thousand eight hundred dollars to be in lieu of the per diem heretofore allowed by law to such judges of the county court, and in lieu of the salary as road overseers heretofore allowed by law to said judges, as provided in section 7897, R. S. 1929, and in lieu of all other fees, or salaries heretofore allowed by law to said judges, except the per diem allowed to said judges as members of the board of equalization and the board of a peals. The salaries herein fixed for the judges of the county court in all counties of this state having more than seventy-five thousand inhabitants shall be paid in equal monthly installments as the salaries of other county officers are paid. In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges in the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in

> going to and returning from the place of holding county court; Provided that in all counties now or hereafter having a population of twenty thousand inhabitants or less such mileage shall be charged only once for each regular term and such mileage shall not be charged over eight times per year for special or adjourned terms.

Thus in addition to the per diem authorized to be paid to judges of the county court, in counties having less than 75,000 inhabitants, for each day necessarily engaged in holding county court, the judges are entitled to "five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court."

The question presented is whether the judges of the county court are entitled to mileage when they sit as members of the county board of equalization?

Section 9811 R. S. Mo. 1929, provides how the county board of equalization shall be constituted:

> "There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization: Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

The judges of the county court do not alone constitute the county board of equalization, thus it is obvious when judges of the county court sit as members of the county board of equalization that they are not sitting as members of the county court.

Section 9818 R. S. Mo. 1929, provides the compensation for county judges as members of the county board of equalization:

> "The judges of the county court, the county surveyor, the county assessor, the sheriff, and the county clerk shall receive $5.00 per day for each day they shall act as members of the county board of equalization: Provided, that this section shall not apply to boards of equalization who are paid a salary."

No provision is made for mileage for county judges as members of the county board of equalization under the above section, and absent a statute authorizing such payment, it cannot be made. The case of Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 860, declares the rule as follows:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279, S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.
>
> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Furthermore provision having been made for mileage while holding county court, the familiar rule of

of statutory construction "expressio unius est exclusio alterius" is applicable. Which means that "the expression of one thing is the exclusion of the other". State ex inf. v. Sweaney 270 Mo. l. c. 692.

From the for going we are of the opinion that judges of the county court are not entitled to mileage when they sit as members of the county board of equalization.

For your information we are also pleased to submit copies of opinions rendered by this department under dates of October 30, 1939 and December 15, 1939, respectively, wherein Section 2092, supra, is also construed.

Respectfully submitted.

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting) Attorney General.

MW/mc
Encls. 2.

MUNICIPAL CORPORATIONS: Sections 6948 and 7108, R. S. Mo., 1929, Sections 11 and 12, Article X of the Const. of Missouri, construed as to limitations of tax levy on cities, towns and villages.

TOWNS AND VILLAGES:

August 29, 1940

FILED
45

Mr. Oscar Jennewein
1226 Pierce Building
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of July 9, 1940, and also your letter of explanation. Your request reads as follows:

"I am a resident of the Village of Rock Hill in St. Louis County. The unofficial estimate of our population according to newspaper reports of the 1940 census is approximately 1800.

"I am very much interested in securing accurate information in regard to the tax limit for general purposes which can be levied by our Village Board. In the 1929 revised statutes of the State of Missouri, I find, under Section 7109, that the maximum tax rate that can be levied by a Village is 25¢ on $100.00 of assessed valuation but that this rate can be increased, by a proper vote of the voters of the Village, within the limits specified in the constitution.

"Upon referring to the constitution, Article 10, Section 11, I find that for communities between 1000 and 10,000 in population, the maximum tax rate is 50¢ on the $100.00 of assessed valuation.

"I do not know if there have been any changes in these provisions because I do not have a copy of the supplements since 1929 and I am, therefore, writing you to find out if these provisions still are in effect. I would also like to know if the 50¢ limit mentioned under Section 11 of Article 10 of the constitution includes the levy for a bond issue. Our Village, at the present time, is levying a tax of 30¢ to retire a sewer bond issue and 20¢ for general revenue. It is my contention that the general revenue could be increased to 50¢, provided it were acceptable to the voters, and that the 30¢ levy for the bond issue could also be maintained."

Your letter of explanation reads as follows:

"Replying to your letter of July 25th in regard to my inquiry on the tax question of the Village of Rock Hill, I wish to inform you that the Village of Rock Hill is not a city of the 4th Class but remains a Village.

"The Village of Rock Hill is one of many small incorporated communities in St. Louis County just outside of the City of St. Louis. However, it does not border upon the City of St. Louis, the cities of Brentwood and Maplewood intervening between the Village of Rock Hill and the City of St. Louis itself. As a matter of fact the Village of Rock Hill is completely surrounded by cities of the 4th Class. These being Ladue on the North, Kirkwood and Glendale on the West, Webster Groves on the South, and Brentwood on the East."

Section 6948 R. S. Missouri, 1929, provides in part as follows:

> "* * * If such report shows that the city has less than 10,000 inhabitants, the city council may levy on all subjects and objects of taxation for city purposes not to exceed fifty cents on the one hundred dollars valuation. Should the population be one thousand or less, said rate of levy shall not exceed twenty-five cents on the one hundred dollars valuation. * * * *
>
> "Provided, however, that nothing herein shall apply to cities of the fourth class adjacent to adjoining or bordering on cities which now have or may hereafter have five hundred thousand inhabitants or more."

It will be noted that this section applies to incorporated cities of the fourth class and contains a proviso that it is not applicable to cities of the fourth class adjacent to, adjoining or bordering on cities which now have or may hereafter have 50,000 inhabitants, or more.

Your letters indicate that Rock Hill is an incorporated village. Therefore, in reading Section 7108 R. S. Mo., 1929, we find that this section provides in part as follows:

> "* * * * and it shall be the duty of such board of trustees to establish by ordinance the annual rate of tax levy for the year, which shall not be in excess of twenty-five cents on the one hundred dollars valuation. * * * * * * * * * "

Your first letter makes reference to the fact that the council is levying thirty cents to retire sewer bonds and twenty cents for general revenue. You raise the question as to whether or not this is in violation of Section 11, Article 10, of the Constitution of the State of Missouri.

We also call your attention to the case of State v. City of Mound City, 73 S. W. (2d) 1017, as a matter of reference.

In the case of Lamar Water and Electric Light Company v. City of Lamar, 128 Mo. 188, the court had this to say in the minority opinion found on page 194, commenting on the earlier case of State ex rel v. Town of Columbia, 111 Mo. 365, which comment is included in this opinion for the purpose of reference:

> "'In that case the town proposed, pursuant to a two thirds vote, to issue bonds for the purpose of building waterworks and an electrict light plant, and to levy and collect annually a special tax over and above the general tax of fifty cents on the $100 valuation to pay the interest on the bonds, and to create a sinking fund to pay the principal. Our conclusion in that case was that fifty cents on the $100 valuation is the highest rate that can be levied by cities and towns of more than one thousand and less than ten thousand inhabitants for any and all purposes, except for the purpose of erecting public buildings, and except for the purpose of paying indebtedness which existed at the date of the adoption of the constitution; that is to say, in 1875. It was therefore, held that the proposed additional tax would be illegal, because in excess of the constitutional rate limit.
>
> "' That case disposes of the exact question which we now have in hand. According to the

ruling then made, the ordinance in this case and the contract sued upon are utterly void in so far as they provide for the levy and collection of this special water tax of forty cents on the $100 valuation. * * * "

However, in reading this case it will be found that the case was transferred to the court en banc and Judge Barclay, in his opinion, which will be found commences at page 209, in construing Sections 11 and 12, Article 10, of the Constitution of the State of Missouri, had this to say: (l. c. 220,221 and 222)

"It seems first of all necessary that the funds, permitted by section 11 to be raised, for the legitimate, ordinary purposes of the government, should be preserved from invasion or diminution by any tax levied under section 12. Experience demonstrates that the limitations of section 11 are narrow enough even as applied to the general needs of the municipalities which that section governs. The provisions of section 12 were not designed to cut down the annual revenue intended for the ordinary wants of the local governments. But such a cutting down would be imperative, if the first alternative ruling, already discussed, were adopted.

"On the other hand, the terms of section 12 are not so drawn as to permit the conclusion that the tax levied under them was intended to be any such myth as it would be if it depended only on a surplus remaining, each year, from the rates levied under section 11.

"The only escape from these results is in the reading of those sections which we have above attempted to justify, namely: That the tax expressly authorized in the last lines of sec-

tion 12 may be imposed in excess of the rates named in section 11, if the other limitations in section 12 are observed.

"We believe also that a due consideration of the exceptions to the rate limitations of section 11 and of the exceptions in section 12 will tend to show that section 12 was never designed to be operative merely within the limits as to rates defined in section 11.

"But we do not regard that point as requiring further development at this time, in view of the other reasons that support our conclusion.
* * * * * * * * * * * * * * *

"Our judgment is that the ruling in the Columbia case should no longer be followed, and that we should adopt a position which will recognize the force of all parts of sections 11 and 12.
* * * * * * * * * * * * * * * "

See Consolidated School District v. Day, 328 Mo., 1105 l. c. 1115, for a distinction.

CONCLUSION.

In conclusion, we are of the opinion that Section 7108, R. S. Mo., 1929, providing for the levy of twenty-five cents maximum on each one hundred dollars valuation is controlling in the situation outlined in your letters, and further, that the city council is not violating Sections 11 and 12, Article X, of the Constitution of Missouri

in levying the thirty cents additional on the one hundred dollars valuation to procure money to retire a sewer bond issue.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:RW

ELECTION JUDGES: Voter must make oath required by Section 10313 before judge is authorized to mark ballot.

July 13, 1940

FILED
7-15
46

Honorable Clarence C. Jones
Probate Judge
Clinton, Missouri

Dear Judge Jones:

Receipt is acknowledged of your letter of July 10, 1940, asking for an opinion as follows:

> "I am requesting your opinion as to Section 10313 of Revised Statutes of 1929 in regard to swearing voters that cannot read and write, or are physical unable.
>
> If I can construe this statute it requires the Judges to swear any voter that is physically unable or cannot read and write before marking their ballot.
>
> I would like to have this statement in plain English with the Attorney-General's signature.
>
> It has been the practice in Clinton, Missouri for Judges to vote them by the hundreds without giving them this oath. If I can read 3882, 3965 and 10313 correctly there is a way to stop this illegal voting.
>
> I am requesting your opinion on Section 10313 and request that you not only send me a copy of this but also send one to the Prosecuting Attorney of Henry County."

Section 10313, R. S. Mo. 1929, mentioned in your letter, is an exception to the law protecting the secrecy of the ballot. The method of balloting now in use, among other things, requires that ballots be secretly cast, and this is provided for in Section 10333, which is in part as follows:

> "Any voter who shall, except as herein otherwise provided, allow his ballot to be seen by any person with an apparent intention of letting it be known how he is about to vote, or who shall knowingly make a false statement as to his inability to mark his ballot, or any person who shall interfere, or attempt to interfere, with any voter when inside said enclosed space, or when marking his ballot, or who shall endeavor to induce any voter before voting to show how he marks or has marked his ballot, shall be deemed guilty of a misdemeanor and punished accordingly. * * * * "

The strictness of the provisions of Section 10333 would have the effect of disfranchising those persons who are not able to read or write or, who are physically disabled so that they cannot mark a ballot. In order that these persons would not be deprived of their right to vote Section 10313, mentioned in your letter, has been enacted, it is as follows:

> "Any elector who declares under oath to the judges of election having charge of the ballot that he cannot read or write, or that by reason of physical disability he is unable to mark his ballot, may declare his choice of candidates to the judges having charge of the ballots, who, in the presence of the elector, shall prepare

> the ballot for voting in the manner hereinbefore provided: Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate."

These two sections, 10333 and 10313, should be read together. They are clearly unambiguous and do not need any construction upon the point which you inquire about. It clearly appears from reading them that all voters are prohibited from letting it be known how they are about to vote, except those persons who are within the exception set out in 10313. The persons coming within the exceptions of 10313 are granted the privilege of revealing their intention as to how they wish to vote to the judges of election, after they have, under oath, stated that they cannot read or write or cannot mark a ballot because of physical disability. The judges of election all have the power to administer oaths and it would be their duty to see that such oath is administered.

CONCLUSION.

It is the conclusion of this department that no judge of election can lawfully mark a ballot of any voter, even those who come within the classification of Section 10313, without first requiring such voter to state, under oath, his need for assistance as set out in Section 10313. If a judge should mark a ballot for a voter without administering such oath he would be placing the voter in a position of improperly revealing his intention as to how he was about to vote and, further, neglecting his own

duty to administer an oath.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:CP

cc to Hon. Charles Hassett,
Clinton, Missouri.

TAXATION AND REVENUE:

1. Trustee has right to bid less than amount of taxes and cost.
2. Court may order land sold for less than taxes and costs.
3. Purchase by trustee does not affect subsequent assessment and levy.
4. Deed indexed grantor by Collector to trustee.
5. State Tax Commission has prescribed and promulgated forms.

February 23, 1940.

Mr. L. C. Kirkman
Office of the County Court Clerk
Texas County
Houston, Missouri

FILED
49

Dear Mr. Kirkman:

We desire to acknowledge receipt of your request for an opinion dated February 19, 1940, which is as follows:

> "I was appointed Trustee by the County Court of Texas Co. on Nov. 6th to buy tax lands and we are unable to understand the law on the proceedings and would like you to give me the following information, and anything further that will be of benefit to us.
>
> "1. Does the Trustee have a right to bid less than the amount of taxes and cost; when in his judgment the land is not worth said amount.
>
> "2. In case the Trustee has an offer of sale for an amount less than the taxes and cost has the court authority to order the land sold.
>
> "3. Can the court withhold this land from taxation as most of the land that the counties are buying is cut over lands and you nor no one can afford to pay the taxes on these tracts for five years for them at their present rate of taxation.
>
> "4. Is there a statute (if not should be) allowing the county to buy this land in and withhold from taxation for

a number of years, same as the Governor is doing. In twenty years from now the timber on these lands would pay a dividend to the several funds, 95% of these lands have paid no taxes for twenty or thirty years, have been sold for taxes party buying cut or all the timber and never pay any taxes same would be resold and too, then on the real estate income who buy forty or eighty for $10.00 or $15.00 and trade it off to some poor fellow in Iowa or elsewhere for $25.00 or $50.00 per month say for $150.00 or $200.00 and when the fellow pays up if he ever does he could not raise a fight on it. Most of our third sales since the enactment of this law have brought from $2.75 to $10.00. Under the County System we can realize in most cases about 1/3% of actual cost, if and when we can sell. All lands are entirely assessed too high.

5. Our recorder and his atty. (which are republicans) and can't agree on the way these deeds should be indexed. I contend that same should be indexed from the name that appears on the tax record as grantor and also by collector to trustee and they hold the name of collector is sufficient.

6. Also in the deed Form 778, which I think you will change when you have time to study same, there appears two places headed. Timber and amount (I hold the 1st appearance are for the actual funds as they appear on the tax books and the one after the recital state for which said real estate is sold, I contend in this second space should be as follows. Say taxes and costs $174.90 I as trustee for a county bid $40.00. I think this second space should have

these funds pro rated, same as if I had bought this land for myself.

"Please give me this and any other information that you have that will help us out in our sale of lands and in handling this in accordance with the meaning of the law."

1. In answer to this request, we are enclosing an opinion rendered by this department to Honorable John W. Mitchell, Assistant Prosecuting Attorney of Buchanan County on February 23, 1940.

2. In answer to this request, we are enclosing an opinion rendered by this department to Honorable F. Hiram McLaughlin, Prosecuting Attorney of Greene County on December 20, 1939.

3. In answer to this request, we are enclosing an opinion rendered by this department to Honorable Maurice Hoffman, Prosecuting Attorney of Buchanan County on February 16, 1939.

4. In answer to this request, we refer you to the above opinion rendered to Mr. Hoffman.

5. Section 11549 R. S. Missouri 1929, is as follows:

"When any instrument of writing conveying or affecting real estate authorized by law to be recorded shall be filed in the recorder's office for record, the recorder shall enter the same in the names of the grantors and grantees in both parts of the abstract and index of deeds, filling each appropriate column with the several items contained in such instrument in alphabetical order, in the names of the grantors and grantees; and if the instrument be made by the sheriff, in the name of the sheriff, and the defendant in the execution, or of

> the person whose land is sold, and of the grantee; and if made by an executor or administrator, in the name of the executor or administrator, and of the testator or intestate, and of the grantee; and if by attorney, in the name of such attorney and of his constituent and of the grantee; and if by a commissioner, in the name of such commissioner, and of the person whose land is sold, and of the grantee. * * * "

Section 9957a, Laws of Missouri 1933 at page 438 is, in part, as follows:

> "If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. * * * "

Section 9957a, supra, provides for the execution and recording of deeds for the sale of land and lots for de-

linquent taxes on real estate but makes no provision for indexing such deeds. Senate Bill No. 311 of the 1939 laws, makes no provision for the indexing of deeds provided therein.

Therefore, as to the procedure of indexing such deeds we may only look to the provisions of Section 11549, supra, a general law of 1929 Revised Statutes relating to the recording and indexing of deeds.

The general provision of said statute with reference to the indexing of deeds is that they be indexed in the names "of grantors and grantees".

The grantor was therefore, of course, the record owner and the grantee, the trustee who was empowered to buy land by Senate Bill No. 311, supra. The Collector, in making such sale, could not be considered a grantor but rather a statutory officer vested with lawful authority to sell and convey the title of the grantor in the enforcement of the general delinquent tax lien for taxes.

In this the statute is clear and unambiguous. In the case of State ex rel. Cobb v. Thompson, 319 Mo. 492, 496, the court, in laying down a rule on this point, says:

> "'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction and the courts are not permitted to search for its meaning beyond the statute itself.' (25 R. C. L. 957; Trefny v. Eichenseer, 171 S. W. l. c. 932; Grier v. Ry., 286 Mo. 523, l. c. 534, 228 S. W. 454; State ex rel. v. Board of Education, 294 Mo. 106, l. c. 115, 242 S. W. 85; R. S. 1919, sec. 7058.)"

CONCLUSION

Therefore, the deed to the trustee should be indexed in the name of record owner as grantor and trustee as grantee.

6. The Statute provides that the State Tax Commission "prescribe the form of all blanks and books that are used by the various revenue officers of this state." Said commission has prescribed and promulgated the forms required by Senate Bill No. 311, Laws of Missouri 1939, at page 850, and we see no reason why they should be changed.

Very truly yours,

S. V. MEDLING
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

SVM:LB
Encls.

SCHOOLS: Under Laws of Missouri, 1939, Section 9233, page 707, when it becomes necessary through lack of funds, tuition can be paid from teachers' fund. (Opinion to Mr. E. S. Trantham, September 9, 1939, overruled.)

May 4, 1940

5-7

FILED
49

Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Superintendent King:

This Department is in receipt of your inquiry of April 4th relative to a previous ruling of our Department, your inquiry being as follows:

> "Inquiry has come to this Department about the proper fund from which the high school tuition may be paid by school districts as provided in Section 16, Laws of 1931, page 343, and as amended in House Bill 319, Laws 1935, page 351.
>
> "In your opinion of September 9, 1939, you ruled that the money in the teachers' fund could not be used for the payment of the high school tuition. Your ruling seems to have been based on the provisions of Section 9233, R. S. 1929. However, since this opinion has been issued, House Bill 337, Revised Laws of 1939, page 707, has taken effect. In substance this amended law combined the provisions of Sections 9233 and 9312 into Section 9233 and made it applicable to all schools

> in the state. Section 9233, R. S. 1929, provided, in part, that certain moneys credited to the teachers' fund shall be applied only to the payment of teachers' warrants. The revised act of 1939 eliminated this restraining clause.
>
> * * * * * * * * * *
>
> "In the light of the changes made in the revised laws of 1939 and the general provisions of the other related laws as indicated herein, would it be legal for school boards to pay the high school tuition from either the teachers' or incidental fund?"

Our opinion of September 9th, 1939, to Mr. E. S. Trantham, Treasurer, Webster County, Marshfield, Missouri, is based on Section 9233, R. S. Mo. 1929, which has been on our statute books for many years. In 1939 the Legislature repealed Sections 9312 and 9233, and enacted in lieu thereof what is now designated as Section 9233. As we recall the opinion to Mr. Trantham, our holding was partially based on the provisions of Section 9312. The two statutes have been combined into one and designated as Section 9233, found in Laws of Missouri, 1939, pages 708-710. Said Section 9233 is as follows:

> "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected. The warrants drawn shall be in the following form, and shall be signed by the president of the board and countersigned by the district clerk:
>
> * * * * * * * * *

* * * * * * * * * * * * * * *

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund', except money apportioned for free text books, which shall be credited to the 'Free Text Book Fund'. Money derived from taxation for sinking fund shall be credited to the sinking fund. Money apportioned for transportation of pupils shall be credited to the incidental fund, and money derived from taxation for annual interest shall be credited to the 'interest fund', the money derived from taxation for incidental expenses shall be credited to the 'incidental fund.' All money derived from taxation or received from the state for building purposes, from sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the 'building fund.' All moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the 'teachers' fund,' of such school district. No treasurer shall honor any warrant unless it be in the proper form,

> and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided, further, that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided, further, that by a majority vote of the school board tuition fees, except state tuition apportionment, may be used to liquidate indebtedness accrued in the building fund. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such fund in accordance with Section 13, Laws of 1931, page 340, and no school warrant shall bear interest."

Noting that the statute, as formerly, states that all tuition fees shall be placed to the credit of

the teachers' fund, and that it is silent as to transfers from the teachers' fund or incidental fund, we next proceed to determine your question, the gist of which is to the effect as to whether such transfer can be made.

An "incidental fund" by its very designation is a miscellaneous all-purpose fund. And we think that if any excess or if any of its funds are needed to supply deficiencies in the other funds, based on taxation without fraud or sinister purpose, that such funds can be used for payment of highschool tuition.

As to the use of money from the teachers' fund for the payment of high school tuition there appears to be no prohibition in the new section, but as stated before there is no special proviso permitting the same to be done. Hence, we must consult other statutes which bear on the question and attempt to arrive at a conclusion in that manner.

Section 9195, R. S. Mo. 1929, contains the following proviso:

> "* * *And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

Section 18, Laws of Missouri, 1931, page 344, which has not been amended but is referred to in Laws of Missouri, 1933, page 388, provides for the assignment of pupils attending an adjoining school which is more accessible, and further provides that the district shall pay the tuition of such pupil or pupils so assigned.

Section 20, Laws of Missouri, 1931, page 346, provides for schools having an average daily attendance

of less than 15 pupils and permits the payment of transportation and tuition as follows:

> "* * *, provided that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

Sections 16 and 16a, as repealed and reenacted by Laws of Missouri, 1935, page 351, and Laws of Missouri, 1933, page 393, place the duty on the board, under certain conditions, to pay tuition of certain pupils after deducting the sum of $50.00 which is paid by the State. It does not mention from what fund the tuition shall be paid.

In your compiled School Laws of 1938, which you have designated as Section 9351n, page 111, it is noted that "until such time as the school district, not maintaining a high school organized under the regulations of the State Superintendent of Schools has become a part of the consolidated high school district * * *, shall be permitted to attend any public high school in such county for a period not to exceed four years, at the expense of the school district in which said person resides, the tuition for said person to be paid by the debtor school district from the teachers' and incidental funds of said school district."

After consulting all the statutes with reference to payment of tuition and the nature of funds from which it may be paid, and the fact that the statute does not in any instance prohibit the payment of tuition from the teachers' fund, we are of the opinion that when it becomes necessary for school boards to pay the high school tuition from the teachers' fund, such funds may so be used; and for the reason of the changes in Sections 9312 and 9233 as reenacted under the new Section 9233, Laws of Missouri, 1939, page 707, you are directed to disregard

our opinion of September 9, 1939, written to Mr. E. S. Trantham, Treasurer, Webster County, Marshfield, Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

SCHOOLS: In deducting money received from state distribution only that amount distributed for teachers' fund and incidental fund should be deducted from the money estimated to be received from the utilities.

August 30, 1940 9/4

FILED 49

Honorable Lloyd W. King, State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Sir:

Answering your request of April 29, 1940, in reference to the approval of a schedule concerning the legal method of the distribution of taxes to the county school districts, will say that the calculation follows the school laws of this state and we are approving same but not as to the correct mathematical amounts. We believe this schedule will be a great help to the individual school districts over the state. We are returning the same and considering it a part of this opinion.

In your request you also ask the following questions:

> "In the light of the foregoing definitions of 'school purposes', what part of the utilities school money should be reported, by the district, as items of deduction when making application for the state school apportionment?
>
> "Would it be proper to count only the amount a district receives for school purposes instead of the total amount of all utilities school money which would include the amount for the erection of public buildings and other building purposes?"

Section 13, Laws of Missouri 1931, page 340, partially reads as follows:

"The board of directors of each and every school district in this state is hereby empowered and required to maintain the public school or schools of such district for a period of at least eight months in each school year. In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this act, it is hereby provided that when any district has legally levied for school purposes (teachers' wages and incidental expenses) a tax of not less than twenty cents on each one hundred dollars of the assessed valuation of property therein, such district shall be allotted out of the public school fund of the state an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of section 14 of this act, one thousand dollars for each high school teaching unit to which the district is entitled according to the provisions of section 14 of this act, and the amount approved for tuition and transportation according to the provisions of section 16 of this act, and then subtracting from the total, which total shall be known as the minimum guarantee of such district, the sum of the following items: The computed yield of a tax of twenty cents on each one hundred dollars ($100) of the assessed valuation of the property of the district, the sum received the preceding year from the county and township school funds, and the sum estimated to be received for the current year from the railroad, telegraph, utility and all

> other taxes based on assessments distributed by the state board of equalization, plus the county foreign insurance fund for the school year 1932-1933 only. * * * * * * * * * * * "

Also in connection with the above Section 13, supra, we call your attention to Section 13a, Laws of Missouri 1939, page 718, which reads as follows:

> "In addition to the items required by Section 13 of this act to be subtracted from the minimum guarantee of a school district for the purpose of determining the equalization quota of such district, after June 30, 1940, there shall be subtracted also the amount, if any, by which the actual proceeds of the minimum guarantee of such district for the preceding year exceeds the amount spent during that year for the maintenance of the school or schools of such district, and maintenance shall be construed as including only teachers' wages and incidental expenses: Provided, however, that if no school is maintained in said district, but the pupils thereof are transported to another district or other districts, maintenance shall be construed as including only the amount spent for the transportation and tuition of such pupils."

Under Section 13 it will be noticed that the section does not provide concerning funds for the erection or permanent repairs of any buildings, but only refers to the maintaining of the school or schools. Also in Section 13a, supra, the Legislature, in construing the term "maintenance of the school or schools", states that it should only include teachers' wages and incidental expenses. "Incidental expenses" as construed by this office means temporary repairs and not the erection or construction of other buildings. Section 13 and Section 13a, supra, refer to only the school fund pertaining to teachers' wages and incidental expenses and do not apply

to any of the other funds, such as, building fund, free text book fund, sinking fund, or interest fund.

Section 13, supra, provides for the deduction of the sum estimated to be received by the current year from railroad, telegraph, utilities and all other taxes based on assessments distributed by the state board of equalization. In view of the legislative construction of the word "maintenance," as set out in Section 13a, supra, the amount deductable as to utilities, as referred to in Section 13, supra, can only mean for the maintenance of schools and not for the erection of new schools.

In the case of State ex rel. v. Wilder, 200 Mo. 97, l. c. 106, the court, in defining "maintain," states as follows:

> "* * * * The word 'maintain' does not mean 'to provide or construct,' but to keep up and preserve, and the word 'operate' means to put into or continue in operation or activity. These expressions have a distinct signification from the words 'purchase or construct.' * * * * * * * * * * * * * "

Also in Words and Phrases, Permanent Edition, Volume 26, page 66, the Supreme Court of Illinois sets out their distinction as follows:

> "In levying a tax under the Detention Home Act for the establishment and maintenance of a county detention home, the items for establishment and maintenance should be separated, in view of Counties Act, section 27, Smith-Hurd Stats. c. 34, section 27, and Revenue Act, section 121, Smith-Hurd Stats. c. 120, section 109, the word 'establish' meaning to create, to institute, to build; and the word 'maintain' involving those things having to do with carrying on the business for which the home was built or established. People v.

Atchison, T. & S. F. Ry. Co., 133 N. E. 250, 300 Ill. 415.

"The word 'maintain,' as used in a contract by which the owners of an adjoining office building agreed on a common entrance and hallway on the center line dividing the premises, and to pay the expense of keeping up and 'maintaining' common conveniences including an elevator, was held to include the operation of such elevator, and not simply to mean to put it in and have it stand idle at the behest of one of the parties, which was contrary to the construction given the contract by sharing the expense of operation. Globe Ins. Co. v. Wayne, 80 N. E. 13, 18, 75 Ohio St. 451.

"Rider providing that automobile liability policy should cover operation of automobiles only by certain named persons held not to restrict liability of insurer, under policy covering ownership, maintenance, manipulation, or use of described automobiles, to party injured because of negligence of one not named in rider in repairing truck covered by policy, since 'maintenance' applied to acts of repair and was not included within term 'operation.' To 'maintain' means to preserve or keep in an existing state of condition, and embraces acts of repair and other acts to prevent a decline, lapse or cessation from that state or condition, and has been taken to be synonymous with 'repair.' Morris v. American Liability & Surety Co., 185 A. 201, 203, 322 Pa. 91."

Also in Words and Phrases, Permanent Edition, Volume 26, page 70, the Supreme Court of the State of

Texas makes a distinction and defines "maintenance" as follows:

> "A vote of the taxpayers of an enlarged district authorizing a tax for the support and maintenance of schools therein does not authorize the levy of a tax on the property of the enlarged district for the interest and sinking fund of bonds of an included district, since 'support' and 'maintenance' are synonymous and mean to hold in an existing state or condition, and in Vernon's Sayles' Ann. Civ. St. 1914, art. 2857, authorizing the trustees to submit to voters two questions, one whether they shall levy a special tax for the maintenance of schools, and another whether they shall levy a special tax for the purchase of sites and the construction of school buildings, 'maintain' isused in contradistinction to debts. Love v. Rockwall Independent School Dist., Tex., 194 S. W. 659, 661.
>
> "An appropriation of $25,000 to the National Conservation Exposition Company, a corporation, created for the purposes of holding expositions, encouraging and supporting agriculture, industrial enterprises, and the breeding of blooded live stock and poultry, made by the Legislature in extraordinary session, and contained in the general appropriation bill under the head of 'Department of Agriculture,' was not embraced within the call of the Governor, which was 'to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the state's institutions, offices and departments,' since, though some of the

> purposes of the corporation were identical with those of the agricultural department, and it, in carrying out its purposes, might indirectly aid the department, it was a separate institution in no way connected with the agricultural department, and the word 'maintain' as used in the Governor's call meant, if not direct maintenance by an appropriation to the department itself, at least one under its control; hence the appropriation was void, because in violation of Const. art. 3, section 9, authorizing the Governor to convene the General Assembly by a proclamation limiting their power specifically to the purposes for which they are convened. State v. Woollen, 161 S. W. 1006, 1014, 128 Tenn. 456, Ann. Cas. 1915C, 465."

CONCLUSION

In view of the above authorities it is the opinion of this department that only that part of the utilities school money should be deducted by the district as items of deduction which are estimated to be received and distributed to the "teachers' fund" and "incidental fund" but not that part of the money estimated to be received from the utilities which would be allotted to the building fund or other funds. We are, therefore, of the opinion that it would be proper to count only the amount a district receives for school purposes instead of the total amount of all utilities school money which would include the amount for the erection of public buildings and other building purposes.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

COUNTY TREASURER: Abolishing Township organization, in counties operating under township organization law, ends term of County Treasurer and Ex Officio Collector.

September 6, 1940

9-11

FILED 49

Honorable J. S. King
Treasurer and Ex Officio Collector
Texas County
Houston, Missouri

Dear Mr. King:

This will acknowledge receipt of your letter of August 15th, 1940 in which you ask for an opinion upon the following questions:

> "General, thank you to construe that part of Sec. 12346, Page 886, laws 1939, which reads as follows: 'And all laws in force in relation to counties not having township organization shall immediately take effect and be in full force in such county.'
>
> "Does that law mean that the office of Treasurer and Ex-Officio Collector would be abolished then, and that a Treasurer and Collector would be appointed to fill the offices of Treasurer and Collector, not permitting me to serve out my term? Who has the authority to make the appointments?"

The election of county treasurers in counties operating under township organization is provided for in Section 12130c, page 426, Laws of 1937, and is as follows:

> "On the Tuesday after the first Monday in November, 1940, and every four (4) years thereafter, there shall be elected by the qualified

> voters in all counties of this State, now or hereafter having a population of 40,000 or more inhabitants according to the last Decennial United States Census, (except in counties having 75,000 and not more than 90,000 inhabitants) and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor. Provided further, that the present county treasurers shall remain in office until their successors are elected or appointed and qualified, unless sooner removed from office."

Section 12130, page 425, Laws of 1937, creates the office of treasurer in counties not under township organization and the election of treasurers in such counties is provided for in Section 12130a, Laws of 1937, page 425, which section is herein set out:

> "On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state,

> now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

These three sections were all part of House Bill 20, enacted by the General Assembly of 1937, which repealed the then existing laws pertaining to these offices and enacted these new sections. It will be observed that while the term of county treasurers in counties operating under township organization and the term of the treasurers not under township organization are each for four years, they are elected at different times. Also Section 12130 above mentioned specifically provides that it has no application in counties not under township organization.

The questions contained in your request are all answered by the case of, State of Missouri, ex inf. Barker v. Duncan, et al., 265 Mo. 26. This was an original proceeding in quo warranto brought to clarify the rights of various claimants to office following an election in Butler County at which township organization was abolished. One of the defendants, Barnhill was the duly elected and acting treasurer at the time of the election; defendant Duncan had been appointed collector by the county court under a statute which then existed; the other defendants were the various township collectors.

The portion of Section 12346, page 886, Laws of 1939, referred to in your request follows the wording of Section 9 of Article IX of the Constitution, and the Supreme Court, in the above mentioned case at pages 41 and 42, said:

> "Is section 9 of article 9 of the Constitution self-executing? It is fairly plain that so much of this section as says that 'in any county which shall have adopted "township organization," the question of continuing the same may be submitted to a vote of the electors of such county at a general election, in the manner that shall be provided by law,' is by no possible view, or by any recognized canon of construction, self-executing. It is equally clear on the other hand that so much of this section as provides that 'if a majority of all the votes cast upon that question shall be against township organization, it shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in said county,' is self-executing.
>
> "This view is held upon the first proposition, viz., that the portion of this section first above quoted is not self-executing, for reasons that are plain and conclusive. The clause first above quoted does not purport to be self-executing; on the contrary upon its face and by its very words it specifically relegates to the Legislature the duty of providing by law for the manner of submitting the question of discontinuence of township organization to the electors of a county having theretofore adopted it. It would be a contradiction in terms to hold it self-enforcing and

> the citation of authority could add neither weight nor clarity to this view. On the other hand the last clause is just as obviously self-executing. For it is clear that it needs no statute to put it in force. Any statute about the matter must needs follow the precise words or the very substance of the Constitution itself and no statute which could be passed could clarify the matter in any respect whatever. Indeed, the clause under discussion merely expresses a status which will instantly result from the election required to be held. Statutory language would be impotent to add aught to the Constitution's expression of this resulting status, and so the clause is self-executing. It is a provision complete in itself and needs no legislation to put it in force. (Davis v. Burke, 179 U. S. 399; Hyatt v. Allen, 54 Cal. 353; Eau Claire Nat. Bank v. Benson, 106 Wis. 624.) For automatically upon holding an election, the conditions required being met in the result of such election the status mentioned instantly ensues."

And, at page 49, the Court further said:

> "Not to pursue the matter further, we are of the opinion that the result of the election held in Butler county in November, 1914, was to discontinue township organization therein and that respondents Barnhill, Harwell, Osborn, Reading, Kearby, Gardner, Ratcliff, Deaton, Burger and Phillips, were thereby divested of authority to act as ex-officio collector of the revenue of said Butler county, and as collectors of the several townships therein, respectively, and therefore the writ

of ouster as to the above-named respondents and each of them, should be awarded."

And further, on pages 50 and 51, in ruling upon the question as to the proper authority to fill the vacancy created by the cutting short of the term of the county treasurer, the Court used the following language:

"Briefly, we reach this conclusion upon these grounds: The last clause of section 9, of the Constitution, supra, provides that when township organization is voted out, at once thereupon 'all laws in force in relation to counties not having township organization shall take effect and be in force in such county.' The view contended for by relator would have the effect of placing such counties as voted township organization out, back into the category of ordinary counties to be governed by the usual and ordinary laws; while the insistence of learned counsel for respondent Duncan would make of such a county a thing apart from all ordinary counties, with different laws to govern it. The makers of the Constitution saw no reason apparently, as we see none, why a county which had before had township organization, but which had elected to return to the common fold, should by that fact alone be set apart in a wholly different category. So they provided clearly that all the usual laws governing ordinary counties should reattach to and govern counties relinquishing township organization, immediately upon their voting it out. The 'laws in force in relation to counties not having township organization,' which laws as we see the Consti-

tution, automatically applied to Butler county, provided at the time of the accrual of this vacancy and at the time the Governor filled it and now provide that as to an office like this 'such vacancy shall be filled by appointment by the Governor.' This being the law which at all of said times applied to 'counties not having township organization,' such law applied ipso facto and immediately to Butler county, the moment said county voted out township organization. Section 11 of article 5 of the Constitution in nowise aids respondent Duncan here. This for the reason that section 9 of article 9 plainly puts Butler county back into the ordinary category of counties the moment it abandoned township organization which had served to take it out of this common category. Section 11 of article 5 of the Constitution says that the Governor shall appoint persons to fill all vacancies in office, ' unless otherwise provided by law.' Here Butler county was required to step back into the ordinary line of counties and reassume all laws for its government which applied to the ordinary county, and as to such counties, i.e., the ordinary county, the appointment of all officers had already been 'otherwise provided by law,' pursuant to a general law which applied to all 'counties not having township organization.' (Sec. 5828, R. S. 1909.)

"So we think there can be no two opinions, that the power of appointment here lay with the Governor and not with the county court; that so much of

> section 11745 as prescribes a contrary rule is unconstitutional and therefore as to the respondent Duncan also the writ of ouster should be awarded. Let our writ of ouster go as to all of the respondents."

There is no special section of law directing any method for filling a vacancy in the office of county treasurer as there was at the time of the case above referred to for filling the office of county collector. There now exists the general section, 10216 of Art. 2, Chap. 61, R. S. Mo. 1929, authorizing the governor to fill, by appointment, vacancies where not otherwise provided. This section is as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office orginally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the

> appointee of the governor shall be entitled to hold such office until such other date."

Section 11 of Article 5 of the Constitution, mentioned in the above referred to case, is the same now as it was then. This section is as follows:

> "When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

CONCLUSION.

Following the above cited case, it is the conclusion of this department that if the proposition to abolish township organization should carry the term of office of the county treasurer and ex officio collector would terminate and that a vacancy would be created which would be filled by appointment by the Governor in accordance with the provisions of Section 10216.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

WOJ:CP

MUNICIPAL CORPORATIONS: Cities under thirty thousand under the Constitution may issue a specific levy for a water systen, but the general law in all cities is that the bonds must be paid out of the revenues of the water or light system.

February 2, 1940

2-8

FILED
50

Mr. Frank W. Kuehl, Counsel
Reconstruction Finance Corporation
Washington, D. C.

Dear Sir:

We are in receipt of your request for an opinion, under date of January 26, 1940, which reads as follows:

> "This Corporation has acquired various general obligation bond issues of municipalities of the State of Missouri. We are interested in obtaining copies of any opinions rendered by your office concerning the allocation of tax levies.
>
> For example, if a municipality has outstanding an issue of bonds to finance the construction of a waterworks system and a separate issue of bonds to finance the construction of a sewer system, does the municipality levy a specific tax for the payment of principal and interest on each issue? Assuming the foregoing is true, are the moneys, when collected, immediately segregated and allocated to separate funds to be used only for the purpose for which such specific tax has been levied?"

Section 12a, Article X, of the Constitution of Missouri, reads as follows:

> "Any city in this State, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds (2/3) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in section 12 of article 10 of the Constitution of this State, not exceeding an additional ten (10) per centum on the value of the taxable property therein, for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: Provided, That any such city incurring any such indebtedness requiring the assent of the voters, as aforesaid, shall have power to provide for, and before or at the time of incurring such indebtedness shall provide for the collection of an annual tax, in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty (20) years from the time of contracting the same, any provisions in this Constitution to the contrary notwithstanding."

The above section applies to cities under thirty thousand inhabitants, and by that section such city can provide for the collection of an annual tax, in addition to other

taxes provided for in the Constitution to pay off the interest and indebtedness during a period of twenty years.

The general law applying to all cities, is set out in Article 31, Chapter 38, R. S. Missouri, 1929.

Section 7661 R. S. Missouri, 1929, reads as follows:

> "The city council of any city of the first, second, third or fourth class in this state, or any city operating under a special charter, having three thousand inhabitants or more and less than one hundred and fifty thousand inhabitants shall have the power to erect, maintain and operate waterworks or to acquire waterworks by purchase as hereinafter provided, and to operate and maintain the same and supply the inhabitants thereof with water and to charge therefor reasonable rates as hereinafter provided."

Section 7667 R. S. Missouri, reads as follows:

> "Whenever a proposition shall be submitted and adopted by a majority of the voters of the said city voting on the proposition, then the said waterworks system shall be conveyed to the city by the person, firm or corporation owning the same, which deed shall convey to the city a valid title to said property except

that such conveyance shall be subject to a vendor's lien for the purchase price of said plant, which shall be evidenced by bonds herein provided for, which shall be issued and delivered to the person, firm or corporation selling the property, in payment therefor. And the said city, for the purpose of paying for the waterworks plant, shall issue bonds to an amount equal to the agreed purchase price, which shall be known as the 'waterworks bonds,' and which shall constitute a first lien on the waterworks plant so acquired, and all the property connected therewith or thereafter acquired constituting a part of the said plant, including the income arising therefrom, it being the intent of sections 7661 to 7682, however, that there is to be no liability on the part of the city to pay the amount evidenced by said bonds out of any other fund than the one herein specified, and said bonds shall not constitute a liability of the city for which the general revenues thereof can be appropriated, or any part thereof, except to pay a reasonable fire hydrant rental for such hydrants as may be used by the city for the purpose of fire protection, and washing and flushing streets, crossings, alleys and sewers, as herein provided."

Section 7668 R. S. Missouri, reads as follows:

"The said waterworks plant and system, when acquired, shall be subject to the control and management of a board known as the 'board of waterworks commissioners,' who shall have the power to issue to the person, firm or corporation, in payment for said waterworks system, bonds in such denomination as may be stated in the proposition to the city or as may be determined by the board, which bonds shall refer to and recite sections 7661 to 7682, inclusive, as authority for their issuance, and shall be signed by each member of the board, attested by the secretary, under the seal of the board, and each bond shall contain substantially the following, among other appropriate recitals therein:

"'This bond shall constitute a first lien in the nature of a mortgage or vendor's lien upon all the property, rights, issues and revenue of the waterworks system in this city, or in any way appertaining thereto, including any and all funds that may have been or may be derived therefrom, whether in existence at the time of the issuing of this bond or thereafter acquired, but this bond shall not create any personal or general liability on the part of this city or the persons signing the same for the payment thereof, and the same shall be paid only out of the property constituting the waterworks system and the revenue derived therefrom, on which it shall be a first lien, as aforesaid, and in case of default in the payment of the principal hereof, or any interest due thereon, for a period of six months,

all of the said property upon which it shall be a lien, as aforesaid, shall be conveyed by the waterworks commissioners to the holders of the waterworks bonds in the proportion that the bonds held by each bears to the entire bond issue: Provided, that said property may be conveyed to a trustee designated by a majority of the bondholders, to be held for the use of all the bondholders in the proportion aforesaid, and the conveyance of the said waterworks commissioners shall also convey all obligations due to the said board of waterworks commissioners from private corporations, individuals, or this city on account of water furnished or consumed, and shall also convey to them, their grantees and assigns, the right, privilege and franchise to continue thereafter the maintenance and operation of said waterworks system for a period of thirty years, and for that purpose to have the use of the streets, avenues, alleys and other public places of the city to maintain and operate the said waterworks plant.'

"The said bonds shall run for a period of twenty years and draw interest at the rate of six per cent. per annum, payable semi-annually, said interest to be evidenced by the coupons attached. The bonds and coupons shall be negotiable in form. The coupons may be signed only by

> the lithographed signatures of the president of the board and the secretary thereof."

Under the above section the bond constitutes a first lien on all the property of the water system and also upon all of the revenue derived through the water system. In your request you ask if a municipality levies a specific tax. In cities under thirty thousand a specific tax may be levied which money must be only for the payment of the principal and interest indebtedness of the bonds. While under the general law no specific tax must be levied but the payment of bonds can be made only out of the revenues of the water department. The revenues of the water department can only be used for the operating of the water system and the payment of the interest and principal indebtedness.

Section 12, Article 10 of the Constitution of Missouri, partially reads as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein,

to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special; provided, That with such assent any county may be allowed to become indebted to a larger amount for the erection of court house or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein; and provided further, That any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. * * * * * * "

Under the above section sewer bonds can be voted, and it further provides for the collection of an annual tax sufficient to pay the interest as it falls due and also to constitute a sinking fund for the payment of the principal within twenty years from the time of contracting the same. Therefore, the money must be allocated to a separate fund to be used only for the purpose for which such specific tax has been levied.

Section 2896 R. S. Missouri, 1929, reads as follows:

> "When any bonds shall have been voted or may hereafter be voted, as provided under the Constitution of the state, for the incurring of any indebtedness by any town, city, township, county, drainage, levee, county or school district, the proceeds from the sale thereof, and all moneys derived by tax levy for interest and sinking fund, as provided under the Constitution, shall be kept by the authorities of such town, city, township, county, drainage, levee, county or school district having control of said funds, separate and apart from any and all other funds of said town, city, township, county, drainage, levee, county or school district, so that there shall be no commingling of said funds with any other funds of said town, city, township, county, drainage, levee, county or school district. The proceeds of any bonds or the sinking fund or the interest collected by reason thereof that may be held by any town, city, township, county, drainage, levee, county or school district, shall, upon the passage of this section, if commingled with other funds of said town, city, township, county, drainage, levee, county or school district, be sepa-

> rated and deposited in a separate fund from any and all other funds. In no case shall the proceeds from the sale of any bonds so sold be used for any other purpose than for the purpose for which said bonds were voted, nor shall the sinking fund or interest collected to meet the interest on said bonds be used for any other purpose than to meet the principal and interest of said bonds."

Under the above section, all money collected on bond issues must be placed in a separate fund so as to retire the bonds with the interest thereon.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

BONDS: COUNTY COURTS: Liable for payment of premiums covering officer's entire term of office when consent and approval made to election of officer to give surety bond.

January 11, 1940

1-15

FILED
57

Mr. Henry C. M. Lamkin
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Lamkin:

We are in receipt of your request for an opinion wherein you state as follows:

"Sometime ago I requested from your office an opinion in the matter of the county court's responsibility for paying for the surety bonds for county officials. I am in receipt of the opinion of your office dated April 4, 1939, furnished to Honorable W. J. Melton, Presiding Judge of the County Court of Charleston, Missouri.

While this is an excellent opinion and throws considerable light on the suggestion, I fear I failed to make myself exactly clear. I will attempt to clarify that question now.

The Callaway County Court consented and approved the payment of surety bonds for county officials by the county court for the year 1939. These bonds were furnished, examined and approved by the county court and the premium for 1939 was paid thereon. An examination of the bonds, which, as will be noted above, were approved and accepted by the court, were for the officers' entire term of office, for example, the county collector's bond binds the surety company from January 1, 1939 to January 1, 1943. Since these bonds were approved by the court, is the court thereby bound to pay the premium for the succeeding three years?

> I would appreciate an opinion from your office on this matter as soon as possible."

In the opinion to which you refer in your letter, this department held, in part, as follows (page 7):

> "Applying the above principles to the facts as presented in your request, if the county court which is the governing body gave its consent and approval to the collector to enter into a surety bond the premium for which was to be paid by the public body protected thereby, then the county, by such action, became bound * * * * *" for the payment of such premium.

Said conclusion was based on the Laws of Missouri, 1937, page 190, Section 1, which provides in part:

> "Whenever any officer * * * * * of any county of this state * * * * * shall be required by the law of this state, * * * * * to enter into any official bond, * * * * * he may elect, with the consent and approval of the governing body of such * * * * * county * * * * * enter into a surety bond * * * * * with a surety company * * * * * authorized to do business in the State of Missouri, and the cost of every such surety bond shall be paid by the public body protected thereby."

The opinion above referred to points out (page 5):

> "It is a matter of common knowledge that prior to the enactment of this statute many county officials gave personal bonds, the cost of surety bonds being almost prohibitive in view of the compensation received by such officers."

> However, the Legislature wishing to protect and safeguard public moneys in a safer and more secure fashion, provided that with the consent and approval of the governing body that surety bonds paid for by the public body protected could be given."

In view of the fact that a surety bond is ordinarily safer than a personal bond, it would be unreasonable to presume that when the legislature said "the cost of every surety bond", they meant any other than the full cost of the bond for the full term of the representative officer. State ex rel and to Use of Drainage District No. 8 of Pemiscot County v. McKay, 227 Mo. App. 327, 52 S. W. (2d) 229.

According to your letter, the county court consented and approved the payment of the surety bonds of the respective county officers for their full terms. There was nothing compulsory under the law for such action by the court. They exercised their discretion, and, in reliance on same, the county officer entered into a surety bond with a surety company.

15 C. J., Section 123, page 471, in discussing the actions of county courts or boards, as referred to in some jurisdictions, declared:

> "Where the previous action of the board is in the nature of a contract which has been accepted by the other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party."

The fact that the agreement by the county court to pay premiums on the surety bond might extend byond the term of office of some member or members of the county court cannot be set up as grounds for failure to meet the cost of the premiums.

In the case of Aslin v. Stoddard County, 106 S. W. (2d) 472, l. c. 476, the Supreme Court of Missouri, in pointing out that a county court had the power to make a

contract for a reasonable time, the performance of which would extend beyond the term of office of some member or members of the county court, said:

> "In Walker v. Linn County, 72 Mo. 650, the county court, through an appointed agent, insured county property for a period of five years. Point was made, on demurrer, that the court had no power to make the contract. This court held that the county court, under its statutory authority to 'have the control and management' of the county's property and its statutory duty to 'take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage,' had the implied authority to insure the buildings belonging to the county. The contract was held valid. The question of the time of performance as extending beyond the terms of office of the then members of the court was not raised and was not discussed in the opinion, and that case therefore can hardly be considered authority one way or the other on the point we now have under consideration. But, if thought of at all, the time factor must have been regarded by the court as not affecting the validity of the contract. And, whether considered or not in that case, can it be doubted that the county court, empowered to insure the county property, could lawfully make a contract for insurance extending beyond the terms of office of its then members, if such contract was made in good faith and was (perhaps because of a lower annual premium than for a short period) advantageous to the county? We think not. Other illustrations might be given. In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold."

From the foregoing, we are of the opinion that where a county court consents and approves the election by the county officer to give a surety bond, it is the duty of the county court to pay the premiums on the bond covering the officer's entire term of office.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:VC

PENAL INSTITUTIONS: The Department of Penal Institutions should not pay the expenses of maintaining an insane inmate of the State Industrial Home for Girls who was transferred to State Hospital No. 1 at Fulton.

January 26, 1940

131

FILED
51

Mr. G. W. Lane, Secretary
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Lane:

Your letter dated January 19, 1940, with enclosures, was received. Said enclosures are herewith returned to you.

I understand the facts are these: Betty Abbott, a resident of Jasper County, was sentenced on a charge of delinquency to the State Industrial Home for Girls at Chillicothe, Livingston County, Missouri, for one year from June 24, 1937, to June 24, 1938, and accordingly, became an inmate of the Chillicothe institution. Before her term expired, and on December 11, 1937, she was taken to State Hospital No. 1 at Fulton, Missouri, as a person of unsound mind. Your letter dated January 19, 1940, in part states, "I am not informed as to the procedure in connection with her transfer."

The question is whether the Department of Penal Institutions should pay the expenses of maintaining Betty Abbott in the Fulton institution from January 1, 1940, to July 1, 1940.

On the basis of the facts stated, the Department of Penal Institutions should not pay said expenses.

On the facts as presented, it would appear the appropriate procedure is that provided as follows by Section 3801, R. S. Mo. 1929, as amended, Laws of 1939, page 352, Section 1, Mo. Stat. Ann. page 3316:

"If any person, after having been con-

> victed of any crime or misdemeanor, become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to inquire into the facts, and he may pardon such lunatic, commute or suspend, for the time being, the execution of such sentence, and may, by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be conveyed to the hospital for the care and treatment of the insane, and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, it shall be executed upon him after such period of suspension has expired; and the expense of conveying such lunatic to the hospital for the care and treatment of the insane shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the hospital for the care and treatment of the insane for his board and clothing shall be paid as now or hereafter provided by law in cases of the insane poor: Provided, if such person shall be adjudged to be insane and shall have property, the costs shall be paid out of his property, by his guardian."

Said Section 3801 appears to include all the provisions of Section 8659, R. S. Mo. 1929, Mo. Stat. Ann. page 7751, which is to a similar effect.

According to the definitions stated in Section 14136, R. S. Mo. 1929, Mo. Stat. Ann. page 850, "delinquency" may consist either of the commission of a crime or of various kinds of conduct, as for example being incorrigible without committing a crime. It is assumed here that the delinquency of Betty Abbott consisted of the commission of a crime, which brings the case within the terms of said Section 3801, supra.

The payment of expense for maintenance "as now or hereafter provided by law in cases of the insane poor" referred

to in the above quoted Section 3801, is the method provided by Section 8636 R. S. Mo. 1929, as amended, Laws 1935, page 387, Section 1, Mo. Stat. Ann. page 7741, wherein it is provided that a county shall pay the expense of the maintenance of insane poor who are residents of such counties.

Inasmuch as the county should pay this expense, the Department of Penal Institutions should not pay it.

CONCLUSION

The Department of Penal Institutions should not pay the expenses of maintaining an insane former inmate of State Industrial Home for Girls, who was transferred to State Hospital No. 1 at Fulton.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
EH:RT

SCHOOLS: County Superintendent is entitled to traveling expenses outside of the county in certain instances.

May 6, 1940

5-6

FILED
51

Hon. Marion E. Lamb
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated April 2, 1940, which reads as follows:

> "I would appreciate an official opinion as to whether or not the County Superintendent of Schools is entitled to traveling expenses outside of the county, in such instances as attending State Teachers' Meetings or meetings of County Superintendents of Schools some place outside of the county. Your early reply on this question will be greatly appreciated."

The population of Randolph County, according to the 1930 decennial census was 26431. Under Section 10618 9463 Laws of Missouri, 1933, page 384, the salary of the County Superintendent of Schools is $2,000.00 a year.

Section 10622 R. S. Missouri, 1929, reads as follows:

> "That the county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent. of his annual salary for traveling expenses and necessary clerical assistance, provided such allowance shall not exceed three dollars ($3.00 annually for every

> teacher under his jurisdiction. The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasury for the payment of same: Provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled."

The above section merely allows traveling expenses and does not specifically state that it should be traveling expenses among the schools over which the County Superintendent has jurisdiction. Under this section traveling expenses and necessary clerical assistance is limited to an amount not to exceed twenty-five per cent of his annual salary, which in the case of Randolph County would be $500.00, provided, however, that the $500.00 would not exceed an allowance of $3.00 annually for each teacher under his jurisdiction. It also further provides that if the County Superintendent shall furnish his own conveyance he shall be allowed mileage at the rate of four cents per mile for each mile actually and necessarily traveled. This amount should not exceed $500.00 or more than the allowance of three dollars annually for every teacher under his jurisdiction.

10617

Section 9462 R. S. Missouri, 1929, reads as follows:

> "During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law. He shall spend annually, studying rural school problems and supervision of schools, five days in conventions called by the state superintendent of public schools, or twenty days in the state university or in one of the state teachers colleges, or in some

> other manner approved by the state superintendent. He shall not receive his salary for the third quarter of the year until he presents a certificate, signed by the state superintendent, stating that he has spent the period prescribed by law in studying rural school problems and supervision of schools, and that his report as county superintendent of public schools has been properly made to the state superintendent of public schools."

Under the above section it is the duty of the County Superintendent to attend conventions for a period of five days called by the State Superintendent of Public Schools or twenty days in the State University or in one of the state teachers colleges, or in some other manner approved by the State Superintendent. This is a mandatory order and it becomes part of his duties as County Superintendent.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the County Superintendent of Schools of Randolph County is entitled to traveling expenses outside of the county in such instances as attending state teachers meetings or meetings of County Superintendent of Schools some place outside of the county. Providing that the expenses do not exceed the amount as set out in Section 9467 R. S. Missouri, 1929. 10622

Respectfully submitted,

APPROVED:

Covell R. Hewitt

COVELL R. HEWITT
(Acting) Attorney General

W. J. BURKE
Assistant Attorney General

WJB:DA

SCHOOLS:
STATEMENTS OF VALUATION
FURNISHED BY WHOM:

It is the duty of the county superintendent of schools to furnish statements to the district clerks showing the assessed valuation of the district.

February 12, 1940

2-14 FILED 52

Mr. Willard B. Leavitt
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following statement:

> "I would like to have the opinion of your office on whose duty it is to furnish school districts assessed valuations:
>
> "Is it the County Clerk's duty to compile and total this valuation or is it the duty of the Superintendent of Schools?"

The powers and duties of the superintendent of schools and the county clerk are provided by statute. We think your question, however, is answered by Section 9457, R. S. Missouri 1929, which provides in part as follows:

> "The county superintendent shall have general supervision over all the schools of his county, except in city, town and village school districts employing a superintendent who devotes at least one-half of his time to the direct work of supervision. * * * * * * * * * * * he shall furnish, annually, statements to the district clerks showing the assessed valuation of their respective districts; * * * * * * "

Section 9261, R. S. Missouri 1929, provides in part as follows:

> "On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes: * * "

This section seems to be the only duties of the county clerk with reference to the taxes of the district. Since we fail to find in the statutes where the county clerk is required to compile and total the valuations of the district, it seems that that would be a duty incidentally falling upon the county superintendent of schools in performing his duties under said Section 9457.

CONCLUSION.

From the foregoing it is the opinion of this department that it is the duty of the county superintendent of schools to annually furnish statements to the district clerks showing the assessed valuation of their respective districts, and if the county clerk does not voluntarily compile and total these valuations, it seems that would be the duty of the superintendent to do.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

NOTARIES PUBLIC: An acknowledgment of a collector to deeds for land sold at a tax sale taken by a deputy collector in his capacity as notary public is valid.

January 2, 1940

16

FILED
54

Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of December 26, 1939, which reads as follows:

> "The Collector of this County has requested that I secure for him a ruling on the following situation:
>
> "A Clerk employed in his office has made application and has been commissioned a Notary Public. In such application she stated herself as Deputy Collector. On several occasions she has taken the acknowledgment of the Collector to certain deeds for land sold at a tax sale. The Collector desires to know whether or not it is proper for this clerk, as a Notary Public, to take such acknowledgments."

Section 9896 R. S. Missouri, 1929, grants the power to a Collector to appoint deputies, and reads as follows:

> "Collectors may appoint deputies, by an instrument in writing, duly signed, and may also revoke any such appointment at their pleasure, and may require

> bonds or other securities from such deputies to secure themselves; and each such deputy shall have like authority, in every respect, to collect the taxes levied or assessed within the portion of the county, town, district or city assigned to him, which, by this chapter, is vested in the collector himself; but each collector shall, in every respect, be responsible to the state, county, towns, cities, districts and individuals, companies, corporations, as the case may be, for all moneys collected, and for every act done by any of his deputies whilst acting as such, and for any omission of duty of such deputy. Any bond or security taken from a deputy by a collector, pursuant to this chapter, shall be available to such collector, his representatives and sureties, to indemnify them for any loss or damage accruing from any act of such deputy."

The section dealing with the general powers and duties of a notary public is Section 11739 R. S. Missouri, 1929, which reads as follows:

> "They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. They may receive the proof or acknowledgment of all instruments of writing relating to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married women; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like cases and in the same manner and with like effect as clerks of courts of record are authorized by law; take and certify depositions and

> affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses, in like cases and in like manner as justices of the peace are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

The question which presents itself at this time is whether or not a person may perform the duty of notary public while holding the position of deputy collector. By constitution or statute, in some jurisdictions, other public offices are incompatible with that of notary, so that one cannot hold both. See Biencourt v. Parker, 27 Tex. 558. There are several provisions contained in the Constitution of Missouri with regard to one holding two offices, and while those provisions are not directly in point with our present problem, nevertheless they seem to show that it was the intention of the framers of our Constitution to except notaries public as an office in placing a bar against certain persons holding two offices. For example, Article IX, Sec. 18, of the Constitution of Missouri, reads thus:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

Again, Article IV, Sec. 12, reads thus:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

We find no statutory provision in Missouri which would prevent holding both of these offices at the same time.

The question now presented is the question of the validity of the acknowledgment under the particular facts set forth in your request. We assume that the acknowledgment you refer to in your request is that required by Section 9957a, Laws of Missouri, 1933, page 438, which reads in part as follows:

> "Such conveyance shall be executed by the county collector, under his hand and seal, witnessed by the county clerk and acknowledged before the county recorder or any other officer authorized to take acknowledgments and the same shall be recorded in the recorder's office before delivery; a fee for recording shall be paid by the purchaser and shall be included in the costs of sale. Such deed shall be prima facie evidence that the property conveyed was subject to taxation at the time assessed, that the taxes were delinquent and unpaid at the time of sale, of the regularity of the sale of the premises described in the deed, and of the regularity of

> of all prior proceedings, that said land or lot had not been redeemed and that the period therefor had elapsed, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed; and such deed shall be in the following form, as nearly as the nature of the case will admit, namely: * * * "

We think an analogous case to the instant case is Cook v. Foster, 96 Mich. 610, 616, 55 N. W. 1019, in which the court said:

> "The deed was executed by the under-sheriff, and the acknowledgment was taken by one Myron C. Wood, a notary public. Mr. Wood was at that time sheriff of the county. The statute provides that such sale shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under-sheriff, or deputy-sheriff of the county, and the deed executed by the officer or person making the sale. How. Stat. sections 8501, 8505. Mr. Wood, in taking the acknowledgment, did not act as sheriff, but as a notary public. We think the acknowledgment valid. * * "

In the case at bar, the person taking the acknowledgment is not acting as deputy collector, but as a notary public.

CONCLUSION

In view of the above provisions of our Constitution

and statutes, and the authorities cited, it is the opinion of this Department that a person may perform the duty of notary public while holding the position of Deputy Collector. Furthermore, it is our opinion that an acknowledgment of a Collector to deeds for land sold at a tax sale taken by a Deputy Collector in his capacity as notary public, is valid.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

HOSPITALS; Tuberculosis: Article 6, Section 36 of the Constitution does not so invalidate the terms of Article 2, Chapter 120, R. S. Mo. 1929, that a county tuberculosis hospital cannot be built and maintained.

March 29, 1940.

FILED
54

Dr. Curtis H. Lohr,
Superintendent St. Louis
County Hospital,
Clayton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of March 15th, 1940, asking for an opinion on a matter pertaining to the construction of a county tuberculosis hospital. The question presented concerns the authority to construct such a hospital in view of the provisions of Article 6, Section 36 of the Missouri Constitution and the construction placed thereon in State ex rel. Bucker v. McElroy, 274 S. W. 749 (Mo. Sup.).

Article 6, Section 36 of the Missouri Constitution provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. (Underscoring ours.)

State ex rel. McElroy, supra, was a suit to test the authority of the Legislature to vest control of sundry public, penal and eleemosynary institutions in a parole board consisting of the judges of the Circuit Court of Jackson County, Missouri. The only function left to the county court was to pay the expenses contracted and incurred by the parole board in the operation, management and maintenance of these institutions. The court, in ruling the point against the parole board, said, l. c. 751, 752:

> "In the language of the organic law, such court 'shall have jurisdiction to transact all county * * * business.' Other business

> may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; i.e., that it shall transact all county business. By Section 2574, R. S. 1919, such court is given control of all county property, both real and personal, and with it the added authority to purchase, lease, and receive by donation any property, real or personal, for the county. Likewise we find the power to sell property belonging to the county, and to audit and settle all demands against the county. Much of this section has stood for many years, and is and was a legislative construction of the Constitution when it speaks of transacting county business. The lawmakers understood that the transacting of county business meant the control of all county property, whether such property was in the nature of either penal or eleemosynary institutions. The lawmakers would have just as much power to place the county jail, or the poor farm, under the control of a parole board, as they would have to place the three institutions mentioned in the pleadings herein, or, to broaden the field, the divers state eleemosynary and penal institutions of the state could as well be placed in a board of supreme or circuit judges."

Thus, if the provisions of Article 2, Chapter 120, R. S. Mo. 1929, attempt to take away from the county court the right to transact county business the said statutes are void because there can be no question but what the erection, operation and maintenance of a county tuberculosis hospital is county business.

The statutes contained in the Article and Chapter above referred to make provisions for the county court to call a special election for the purpose of voting bonds to construct a tuberculosis hospital if five per cent of the voters of the county so petition the court. If two-thirds of the votes cast at said election are in favor of the bonds the court is to issue them and include in the annual tax a levy sufficient to pay the

interest and retire the bonds within twenty years. The bonds are to be sold by the county court to the highest and best bidder.(Section 13956, R. S. Mo. 1929).

The statutes next direct the county court to appoint a tuberculosis hospital board of five members within sixty days after the bond election. The court fixes the terms of the newly appointed members and may remove for cause any board member. The hospital board so appointed is to select a treasurer who is to give bond,to be approved by the prosecuting attorney and the county court, to secure the faithful accounting for all moneys coming into his hands as treasurer of the tuberculosis hospital. This board is vested with "exclusive control of all moneys collected to the credit of the tuberculosis hospital fund, * * * and all moneys received for such hospital purposes, whether by sale of bonds or by appropriation from the taxes collected * * *for * * * said hospital, or from any other source, shall be turned over to the treasurer of said board".(Section 13957, R. S. Mo. 1929).

The treasurer is to account to the board monthly for the funds in his hands and a copy of the report to the board is required to be filed with the clerk of the county court. The board is authorized to employ the necessary employees and fix their compensation and is required to keep an office in the county where all records shall be kept open to public inspection at reasonable hours. Annually the board must report to the county court its receipts, the source and how said money was expended. (Section 13957, R. S. Mo. 1929).

The board is empowered to adopt the plan for the building and enter into the contract for the construction of said building. (Section 13958, R. S. Mo. 1929).

Said board has power of eminent domain equal with that of private utility corporations. (Section 13960, R. S. Mo. 1929).

The determination of what patient shall be admitted and the cost of the services rendered is left to the board. (Section 13961, R. S. Mo. 1929).

From this summary of the statutes it appears that all functions pertaining to the raising of money for the erection, operation and maintenance of the hospital is

left to the county court, but that the letting of the contract to erect the hospital building and the expenditure of the funds raised for that purpose and for maintenance and operation is left to the hospital board. The only control left to the county court over the expenditure of the funds and the erection of the building is indirectly in that, that the court has the power to remove board members for cause and the yearly report required to be made by the board to the county court.

There is nothing in the act relative to raising funds for hospital that contravenes Article 6, Section 36 of the Constitution, since that function is left solely to the county court, and, even if we concede that those provisions of the act giving exclusive control of the expenditure of all funds are void, that does not prevent the erection of the hospital. The county court, under its constitutional power to transact county business, may join with the hospital board in adopting plans for a building and entering into a contract for its construction, and thus obviate any objection that may arise from that source.

It can hardly be said that the vesting in the board the power to hire employees and make rules for the conduct of the hospital is void for the reason that that function is county business which the court must transact. The Constitution does not contemplate that the court shall attend to every detail of court affairs. Examples of this are: the county health physician, county clerk, superintendent of county farms, agent to see after school fund property, and many others that transact county business under the supervision of the county court, but in none of the instances mentioned does the court attend to every detail. The court could not be expected to do so in the case of the operation of a hospital since that requires technical knowledge that could only be found among members of the medical profession.

It is the rule in this state that where a statute or act is susceptible to two constructions and one will cause it to be unconstitutional, then the courts will construe the statute or act in the way that will cause it not to contravene the Constitution. State ex rel. Gorman v. Offutt, 26 S. W. (2d) 830 (Mo. App.); State ex rel. McAllister v. Dunn, 277 Mo. 38. We think Article 2 of

Chapter 120, R. S. Mo. 1929, is susceptible to two constructions and have applied the one that will obviate any doubt about the validity of the law. That construction is that the board, in building, operating and maintaining a tuberculosis hospital, acts as the mere agent of the county court and as such its actions would be subject to the control of the county court.

CONCLUSION.

Therefore, it is our opinion that Article 6, Section 36, of the Missouri Constitution, requiring all county business to be transacted by the county court, does not prevent the construction, maintenance and operation of a county tuberculosis hospital under Article 2 of Chapter 120, R. S. Mo. 1929, since the court, under its constitutional powers, may join with the hospital board in taking action to erect said hospital, and that thereafter the actions of the board are subject to the constitutional power of the county court.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General.

LLB:CP

CORONERS: County liable for fees of coroner's inquest over body of deceased, dying in County of Coroner as result of injuries received in another County.

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December 20, 1940

127

FILED
54

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This Department is in receipt of your letter of December 2nd, 1940, in which you request an opinion, as follows:

> "A man was injured by an explosion of a gas line in PIKE COUNTY, ILLINOIS. There was no suspicion of foul play. This man was brought to the Hospital in PIKE COUNTY, MISSOURI, and died in this State as a result of his injury. The Insurance Company requested the Coroner to hold an inquest which he did. The bill for this inquest is now presented to the County Court. Under these circumstances is the County Court of PIKE COUNTY, MISSOURI, liable for these costs?"

Inasmuch as the question you submit has been ruled by this Department on two other occasions, and wherein it was decided that the County Court was liable, there is herewith submitted copies of these two opinions, namely, the opinion of Mr. Gilbert Lamb, dated March 8, 1933, and the opinion of Mr. Aubrey R. Hammett, Jr., dated October 14, 1937.

Your request does not so state, but it is assumed that the Coroner held the inquest before a jury.

In the event, however, the inquest was not held before a jury, it is the opinion of this Department that your County would not be liable for the costs of the coroner's inquest. This seems to be effect of the decision of the Kansas City Court of Appeals in the case of Patrick vs. Employers' Mutual Liability Insurance Company, 118 S. W. (2d) 116, and wherein it was said (l. c. 122):

> "Under the provisions of these sections it seems apparent that the coroner has no authority to perform an autopsy under the circumstances here present, or have one performed, except in connection with an inquest to be held before a coroner's jury."

CONCLUSION.

It is, therefore, the conclusion of this Department that Pike County, Missouri, is liable for the costs of the coroner's inquest, providing such inquest was before a coroner's jury.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

VCT:CP
Encs: 2.

INSURANCE: Approval of articles of association of Washington Fire and Marine Insurance Company.

January 22, 1940 1/22

FILED
55

Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Att: Charles J. Harvey, Assistant Counsel

Dear Sir:

We have received your letter of January 22 in which you enclosed declaration of intention to form an insurance company under Article 6, Chapter 37, R.S. Missouri, 1929, said declaration comprising the articles of association of the Washington Fire and Marine Insurance Company, together with the affidavit of proof of publication.

We have examined the above mentioned declaration, articles of association and affidavit of publication and find the same to be in accordance with the provisions of Article 6, Chapter 37, R.S. Missouri, 1929, and not inconsistent with the Constitution and Laws of the State of Missouri and of the United States.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

TYRE W. BURTON
(Acting) Attorney General

JFA:VAC

INSURANCE: Mutual stipulated premium companies can not be licensed. Charters of insurance companies are not forfeited because of non-user.

February 3, 1940

FILED
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Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Attention: Charles L. Henson,
Chief Counsel

Dear Mr. Lucas:

We have received your letter of January 22, 1940, which reads as follows:

"This letter relates to The Bankers Security Mutual Life Insurance Company. I understand that four or five years ago they folded up and Mr. Winger personally paid out all claims. I think this has had the attention of Mr. Allebach in the past and while he was with the Department.

The immediate questions before us are whether a company's charter should be forfeited for non-user or whether we shall allow them to resume business under the old charter. If they are allowed to resume business under the old charter, then of course the question arises as to what they must do under Sections 5760 and 5761 to do this. Akin to that question is also the question whether or not the Article 4 company can operate as a mutual, or whether they must have at least $25,000 in stock.

The Superintendent desires to submit

these questions to you, not only as his legal adviser under the statutes, but obviously for the question which your Department must ultimately settle, and that is whether the non-user of corporate powers for the stated length of time should warrant ouster proceedings by your office. It seems to me that it would be useless for us to permit them to resume business if, in turn, their charter should be forfeited. I attach hereto copy of a letter addressed to the Superintendent by Warren A. Drummond, dated January 10, 1940, which requests the information as I understand it."

You enclosed copy of a letter from Warren A. Drummond, an attorney in Kansas City, which is as follows:

"We desire to be informed by the Missouri Insurance Department as to what requirements must be met in order to obtain a certificate of authority to commence doing a mutual stipulated premium plan of insurance business in the State of Missouri under the following circumstances.

The Bankers Security Mutual Life Insurance Company was granted a charter as an assessment insurance company under Article 3 of Chapter 50, Revised Statutes of Missouri for 1919 by the Circuit Court of Jackson County, Missouri at Kansas City, the regularity of such proceedings being certified to by Mr. Joseph B. Thompson, then Superintendent of Insurance who, on the 8th day of November, 1929, certified that the company had complied with the insurance laws of the State of Missouri and granted it a certificate of authority to commence business.

This company actually conducted an insurance business under the assessment plan until the year 1931. On the 12th day of May, 1931, the directors of this company voted to change the type of insurance business then being conducted by the company from the assessment plan to the mutual stipulated premium plan under Article 4, Chapter 37 of the insurance code. Thereupon, amended Articles of Association were entered into and on the 15th day of May, 1931, Joseph B. Thompson, then Superintendent of Insurance for Missouri, certified that he had examined the amended articles and found them to be in compliance with the provisions of Article 4, Chapter 50 of the Revised Statutes of Missouri for 1919. Upon the same date, Mr. G. C. Weatherby, special counsel for the Attorney General of the State of Missouri, in a letter to Mr. James K. Coolidge, then counsel of the Missouri Insurance Department, stated that the papers submitted by Mr. Coolidge to the Attorney General concerning the reincorporation of the above entitled company as a company to be operated under the stipulated premium plan had been referred to him for his attention, and, in his opinion, the proceedings of the directors were regular and in compliance with the law of the State of Missouri governing the same. This report was approved by Mr. Stratton Shartel, then Attorney General for the State of Missouri.

On the same date, May 15th, 1931, Mr. Charles U. Becker, then Secretary of State for Missouri, issued a certificate of incorporation for this company, stating that all provisions of law for the formation

of an insurance company on the stipulated premium plan had been complied with.

Thereafter, the above named company, under the charter, certificates, and authorities hereinbefore mentioned, was operated as a mutual stipulated premium plan company. Such operation continued until some four or five years ago when the company paid all of its indebtedness and ceased to do business but did not surrender its charter, nor receive back its deposits with the Missouri Insurance Department, nor has the charter ever been forfeited but is still outstanding.

We represent a group of Kansas City business men who are desirous of qualifying to do a stipulated premium insurance business as a mutual company under this charter. It is the belief and contention of ourselves and our clients that the deposit required by law of such a company is $5,000 as provided and described by Section 5761, R. S. Mo. 1929. Our clients are ready to meet this requirement. In the event you do not agree with our conclusions with respect to the amount of the deposit please advise us as to your views of same."

The first question you ask is whether an insurance company charter stands as forfeited for the fact only that it has not been used for some period of time.

On January 24, 1940, this office addressed an opinion to the Honorable J. W. McCammon, Supervisor of the Building and Loan Department of the State of Missouri, in which this same question was discussed. We are enclosing a copy of this opinion. We there held that the charter of a building and loan association does not automatically die when the association quits business; that the charter is, under such

circumstances, merely held in abeyance awaiting for the same to be destroyed by appropriate court action, or such voluntary action as is required by the corporation laws; that the Building and Loan Supervisor does not have the authority to void the charter. The same reasoning would apply to insurance companies and to the powers of the superintendent of insurance and we are, therefore, of the opinion that the charter in question did not cease to exist merely because it has not been used for the past four or five years.

You state that the Bankers Securities Mutual Life Insurance Company appears to have been chartered as a Mutual Stipulated Premium Company under the terms of Article IV, Chapter 37, R. S. Mo. 1929, and you ask whether the company can operate as a mutual, or whether it must have at least Twenty-five Thousand Dollars ($25,000) in capital stock. A mutual company, of course, has no capital stock.

Section 5760, R. S. Mo. 1929, contained in said Article IV, provides what the articles of agreement of a stipulated premium company shall contain. This section reads in part as follows:

> "The persons mentioned in section 5759 of this article shall be designated as corporators, and such persons shall associate themselves by articles of agreement, in writing, duly signed and acknowledged, setting forth: First, the corporate name of the proposed corporation, which shall not be the name of any corporation heretofore incorporated or doing business in this state for similar purposes, or any such imitation of such name calculated to mislead the public; second, the name of the city, town or county in which the principal office is located; third, the amount of the capital stock of the corporation, provided the same be a stock company, which shall not be less than $25,000, the number of shares into which it is divided, and the par value thereof, that the same has been bona fide sub-

> scribed, and actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors; the name and place of the several shareholders and the number of shares subscribed by each; fourth, the number of the board of directors or managers, which shall be not less than seven, their powers, and duties, and the names agreed upon for the first year; fifth, the number of years the corporation is to continue; sixth, a statement that the company is formed for the purpose of carrying on the business of insurance under the provisions of this article."

It will be observed by the third provision above the amount of the capital stock of the corporation, "provided the same be a stock company", shall not be less than Twenty-five Thousand Dollars ($25,000), all of which shall be paid up in cash. This quoted part is the only suggestion in the entire article that anything but a stock stipulated premium company was ever contemplated by the legislature. Nowhere in the article is the expression "mutual company" used. Nowhere in the article has the legislature intimated what type of a financial structure a mutual stipulated premium company should have as a prerequisite to its engaging in business. The term "provided the same be a stock company" could as well include a reciprocal exchange or a fraternal. Therefore, since the legislature has not provided the machinery for the operation of a mutual stipulated premium company or for the operation of any other plan of insurance on the stipulated premium plan other than on the stock plan, it would seem that no other plan was intended.

The legislative intent in this respect is clearly shown by a review of the statutory requirements of each of the different types of companies provided for in the insurance code of this state. Article II, page 37, R. S. Mo. 1929, provides for the formation and operation of joint stock old line life insurance companies and mutual old line life insurance companies. As to joint stock companies, Section

5694 provides what the charter shall contain and Sections 5696 and 5715 states that the amount of paid up capital stock shall not be less than One Hundred Thousand Dollars ($100,000). As to the mutual companies, Section 5698 provides what that type of charter shall include and Section 5715, as amended Laws of Missouri 1939, page 454, states that, "No mutual company formed under the provisions of this article or of the laws of this state, shall commence or continue to do any business mentioned in Section 5690 until agreement, in writing, with such companies shall have been entered into by not less than one hundred persons for assurance upon their own lives, or the lives of other persons for their benefit, nor until it shall have received premiums on the same in cash, or partly in cash, and partly in bona fide obligations, to an aggregate amount of not less than one hundred thousand dollars."

Article III, of Chapter 37, R. S. Mo. 1929, provides for life insurance on the assessment plan. This is a form of mutual company and has no capital stock. Section 5746 of said article, as amended in Laws of Missouri 1933, page 272, states who may organize such a company, how it shall be organized, together with original license requirements. This section then provides that:

> " * * no certificate of incorporation issued as aforesaid until the Superintendent of the Insurance Department shall certify that * * * * * * * the society, association or company seeking to be incorporated has secured applications for not less than one hundred thousand dollars insurance by not less than one hundred persons, and that fifteen thousand dollars in securities, approved by the Superintendent of Insurance has been deposited with the Department of Insurance, which fund shall be held in trust as a beneficiary fund by the said Superintendent of Insurance."

Article VI of the Insurance Laws provides for the formation

and operation of stock fire insurance companies, mutual fire insurance companies, and stock casualty insurance companies. The charter requirements of joint stock companies, both fire and casualty, are set out in detail in Section 5798. Section 5807 requires a capital stock fund of at least Two Hundred Thousand Dollars ($200,000) for these companies, except for companies doing exclusively a plate glass or accident insurance business. These latter companies are required to have only One Hundred Thousand Dollars ($100,000) of capital stock. Section 5795 requires each company to deposit Two Hundred Thousand Dollars ($200,000) with the Superintendent of Insurance before starting business. As to mutual fire insurance companies, the charter requirements are set forth in detail in Section 5803, and Section 5808 states that before such a company can begin business, it must have a guaranty fund of Fifty Thousand Dollars ($50,000), which shall be deposited with the Superintendent of Insurance, or in lieu thereof two hundred applications for membership and insurance with premiums not less than One Hundred Thousand Dollars ($100,000) of which thirty per cent at least shall be paid in cash.

Article VII provides for the formation and operation of mutual casualty insurance companies only. Section 5840 states definitely what the articles of incorporation shall specify, and Section 5845 provides that no such company shall be licensed until at least two hundred separate risks are insured, and at least Twenty-five Thousand Dollars ($25,000) shall have been collected.

Article XI, dealing with reciprocal exchanges, and Article XIII, with fraternal beneficiary associations are as detailed as the articles described above. Each of the articles in the insurance code providing for the organization and operation of insurance companies give in detail the steps which must be taken to complete their organization, together with exact minimum financial and insurance requirements. The duties of the superintendent of insurance are outlined, and the attorney general is given the duty of certifying all articles of incorporation as to form, and whether or not the articles comply with the law under which the same are proposed to be organized. The statutes descend into the minutest details

in prescribing the duties of the superintendent of insurance and the attorney general in the formation of insurance companies. This is true in every case, except in connection with the proposition you submit, that is, a mutual stipulated premium company. It appears, therefore, that the legislature never intended that such a company should be incorporated. If it had, it would surely have prescribed the method of organization, together with the minimum original license and financial requirements, in order to chart the course and guide the superintendent of insurance and the attorney general in passing upon the articles of incorporatinn and assets, the same as it has done in every other type of company.

Section 5760 of the stipulated premium laws reads in part as follows:

> "Said articles of agreement shall be submitted to the superintendent of insurance and attorney-general, and if they are found by these officers to comply with the provisions of this article, they shall approve the same."

Since no requirements are set up in Article IV for a stipulated premium company on the mutual plan, it would be impossible for either the superintendent of insurance or the attorney general to find that the articles of agreement, "comply with the provisions of this article."

It is suggested that the deposit of Five Thousand Dollars $5,000) required to be made with the superintendent of insurance by stipulated premium companies by Section 5761 was intended as the minimum monetary requirement for mutuals. This section provided that <u>all</u> stipulated premium companies shall make this deposit and, of course, this applies to stock companies. This section likewise makes no mention of mutual companies. It is difficult, therefore,

to reach the conclusion that the legislature intended this deposit to be a guaranty fund for mutuals to be used in place of the capital stock fund required of stock companies.

It will also be observed that the legislature, in enacting Article III pertaining to assessment life insurance companies, made provision for any needs which might exist for a small mutual life insurance company. If it can be said that Article IV also provides for the formation of a small mutual life insurance company, then the legislature has provided an almost exact duplicate. Without definite language and detailed requirements for such a company in Article IV, we do not believe the legislature intended any such result.

CONCLUSION

It follows, therefore, that the charter of an insurance company does not automatically die because of non-user. Such a charter can only be destroyed by appropriate court action or the form of voluntary action required by law.

Further, that since Article IV, Chap. 37, R. S. Mo. 1929, which deals with companies doing business on the stipulated premium plan, makes no provision for the corporate set up or the financial requirements of a mutual company, neither the superintendent of insurance nor the attorney general can certify that such a company has complied with the provisions of the article, or that its requirements have been met in order to qualify for a license to do business.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RT
Enc.

February 15, 1940

2-16

FILED
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Honorable Ray B. Lucas
Superintendent
Department of Insurance
Jefferson City, Missouri

ATTENTION: Mr. Charles J. Harvey
Assistant Counsel

Dear Sir:

We have received your letter of January 15, in which you inclose copies of amendments to the Articles of Association of the Missouri Casualty Company, a mutual company. We assume that this company operates under the provisions of Article VII, Chapter 37, R. S. Mo. 1929.

We have examined the said amendments and we are of the opinion that the same are in accordance with the provisions of Article VII, Chapter 37, R. S. Mo. 1929, and are not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Very truly yours,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RT

INSURANCE: Approval of amendment to Articles of Association of the Washington Fire and Marine Insurance Company.

February 23, 1940

2-24

FILED
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Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. Charles Harvey

Dear Sir:

We have received your letter of February 21st, in which you enclosed copies of an Amendment to the Articles of Association of the Washington Fire and Marine Insurance Company. The amendment which was unanimously adopted by all the stockholders and the Board of Directors provides that the number of directors in the company shall hereafter consist of eighteen (18) of the stockholders instead of nine (9) as the Articles have heretofore provided. From the name of the company, that is, the Washington Fire and Marine Insurance Company, we assume that it is ta stock fire insurance company authorized to do business under the terms of Article VI, chapter 37, R. S. Missouri, 1929.

We have examined the said amendment, and we find that it is in accordance with the provisions of Article VI, chapter 37, R. S. Missouri, 1929, and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

JFA: RV
Enc.

INSURANCE: Mutual insurance companies in existence prior to the year 1899 can become stipulated premium companies without capital stock.

May 2, 1940

5-6

FILED
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Honorable Ray B. Lucas,
Superintendent
Department of Insurance
Jefferson City, Missouri

Attention: Mr. Charles J. Harvey
Assistant Counsel

Dear Sir:

We have received your letter of April 23rd regarding the Industrial Benefit Association which reads as follows:

"The above named Association was incorporated in July 1893, by pro forma decree in the Circuit Court of the City of St. Louis, as a fraternal benefit society under the laws existing at that time, and it has been continuously operating up to the present, issuing benefit certificates to its members and collecting small weekly dues or premiums. During these years it has been licensed by this Department as a fraternal beneficiary society, although it is not such a fraternal benefit society as we find today, in that it has no ritual or lodge work, and its officers state that it would be impractical for them to operate as a true fraternal for the reason that its members are both white and colored.

"On October 5, 1939, the above Association filed amended Articles of Association with the Secretary of State in accordance with Section 5775, Article 4, Chapter 37, R. S. Mo. 1929, for the purpose of reincorporating under the above section as a mutual stipulated premium company, and the Secretary

> of State issued his certificate certifying that said amended Articles of Association had been filed in his office. Thereupon, said Association filed with this Department certified copy of such amended articles, together with application for license to do business in this State as a mutual stipulated premium company.
>
> "An examination of the books and records of said Association discloses that it has assets over and above all liabilities in excess of $25,000.00.
>
> "Will you kindly advise this Department, in view of the above, whether or not the above Association has complied with the laws of the State of Missouri, particularly Article 4, Chapter 37, and whether or not license to transact business should be issued or denied."

Article IV, chapter 37, R. S. Missouri 1929, contains the laws dealing with companies doing business on the stipulated premium plan. On February 3, 1940, we addressed an opinion to you in which we held that a company could not be incorporated as a mutual stipulated premium company because the legislature had never made any provisions for the formation of such a corporation. The company concerned in that opinion was the Bankers' Security Mutual Life Insurance Company. The opinion request there showed that the particular company was originally incorporated in the year 1929 as an assessment association under Article III, chapter 37, R. S. Missouri 1929, and re-incorporated in the year 1931 as a mutual stipulated premium company. We held that said Article IV did not provide for the original incorporation of a mutual company and in effect the purported company therein involved did not exist.

You have now presented a different question and that is whether a mutual company, in existence at the time Article IV was first enacted, can accept the pro-

visions of said Article without becoming a stock company. You state that the Industrial Benefit Association was first incorporated in July 1893. The stipulated premium law was first enacted by the legislature in the year 1899, and is contained in Laws of Missouri 1899, pages 260-267, inclusive. This act appears in the Revised Statutes of 1899 as a new article. Section 7930, R. S. Missouri 1899, then a new section, and is in words and figures the same as Section 5775, R. S. Missouri 1929, which reads as follows:

> "Any domestic life or accident corporation, company or association existing or doing business in this state at the time this article takes effect, may, by the vote of a majority of its board of directors or trustees, accept the provisions of this article and amend its articles of incorporation to conform to the same, so as to cover and enjoy any and all the provisions and privileges of this article the same as if it had been originally incorporated thereunder, and it shall file such amended articles of incorporation in the office of the secretary of state, a certified copy of which shall be filed with the insurance department, and shall thereafter perpetually enjoy the same and be deemed to have been incorporated under this article. Reincorporation, however, shall in no way annul, modify or change any of the existing contracts and liabilities of such corporation, and any and all such contracts and liabilities shall continue in force and effect the same as though such corporation had not reincorporated or qualified under this article, neither shall such reincorporation in any way prejudice, impede or impair any pending action or proceeding or any rights

previously acquired."

Since it appears that the Industrial Benefit Association was in existence and was doing business in this state at the time Article IV took effect, the company undoubtedly has the right to re-incorporate as a stipulated premium company under its terms. Since it also appears that the company was incorporated in 1893 on the mutual plan without capital stock, we also believe that it may be re-incorporated under Section 5775 and do business on the stipulated premium plan without changing its type and becoming a capital stock company.

There is nothing contained in said Article IV which indicates that companies in existence prior to the passage of the article must become capital stock companies in "accepting the provisions" of the article. Section 5775 merely states that any existing company, by a vote of a majority of its board of directors or trustees, may "accept the provisions of this article and amend its articles of incorporation to conform to the same, so as to cover and enjoy any and all the provisions and privileges of this article the same as if it had been originally incorporated thereunder, * * * ". In this connection Section 5760, R. S. Missouri 1929, and also contained in Article IV, provides what the articles of agreement of a stipulated premium company shall contain. It provides that part three of the articles of incorporation shall contain "the amount of the capital stock of the corporation, provided the same be a stock company, which shall not be less than $25,000, etc." (underlining ours)

While we pointed out in our opinion of February 3, 1940, that the above underlined part did not provide for the formation of a new stipulated premium company on the mutual plan because Article IV does not contain the original requirements for the formation of such a new company, we believe said provision is applicable and was intended to apply to companies in existence prior to the year 1899 and which might wish to avail themselves of the provisions of Section 5775. If this is not true, then the term "provided the same be a stock company" is meaningless and of no effect under any circumstances. In State ex rel. Orscheln

Bros. Truck Lines, Inc., v. Public Service Commission of Missouri, 98 S. W. (2d) 126, the Kansas City Court of Appeals stated the following general rule of law, l. c. 126:

> "* * * It is a well recognized rule of statutory construction that effect must be given, if possible, to the whole of the statute and every part thereof so that every section, word, clause or sentence be made operative." (citing many cases)

Therefore, to give effect to every word, clause and sentence it must be said that it was the intent of the legislature that mutual companies in existence prior to the enactment of Article IV need not become a stock company in accepting the provisions of the article. If the company involved happened to be a stock company, then, of course, it would necessarily need a capital stock of at least Twenty-five Thousand Dollars ($25,000.00) before it could be licensed under the direct wording of the statute.

Section 5761 of Article IV provides that no stipulated premium company shall do business until at least two hundred persons have contracted for, or there is in force, at least Two Hundred Fifty Thousand Dollars ($250,000.00) of insurance. This section further provides that "every corporation incorporating or re-incorporating under the provisions of this article shall deposit with the superintendent of insurance such securities as are required by law to be deposited by insurance companies the sum of five thousand dollars before it shall commence business. * * " These provisions of Section 5761 should, of course, be met before a license is issued as the same undoubtedly applied to all companies doing business on the stipulated business plan whether re-incorporated under Article IV or not.

In your letter you state that the company has complied with the other provisions of Section 5775 in that amended articles of the association have been filed with the Secretary of State and that certified

copies of the same have been filed with the Insurance Department. From what you say we presume that these articles follow the terms of Article IV.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:DA

INSURANCE: 2% gross premium tax on life insurance companies cannot be collected when company is no longer licensed even though some business remains in force.

August 17, 1940

8-27

FILED
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Honorable Ray B. Lucas, Sup't.
Department of Insurance
Jefferson City, Missouri

ATTENTION: Hon. Charles L. Henson
Chief Counsel

Dear Sir:

We have received your letter of July 12, 1940, which reads as follows:

"Upon the insolvency of the Royal Union Life Insurance Company and the Northern States Life Insurance Company liquidation was undertaken in the states of Iowa and Indiana respectively. The said companies respectively domiciled in those States.

The Lincoln National Life Insurance Company made contracts respecting each of these companies, a copy of which contracts is attached.

The Lincoln National Life Insurance Company is a foreign life insurance company domiciled in Indiana, and is licensed to do business in Missouri, and has been continuously licensed here for many years, and prior to and at the time these contracts were made.

The Lincoln National Life Insurance has raised the question as to whether or not the 2% premium tax on foreign insurance companies should be levied on premiums received from policyholders

> of the two defunct companies since the making of the contracts. Their position is stated in a brief which they are submitting, and which I attach hereto. The amount of the tax is not very large. But in view of the fact that half of such taxes go to the State Revenue Fund and the other half to the State School Fund, we regard the question here as one which should be passed upon by the Attorney General, and at the request of the Superintendent of Insurance, I am submitting it."

Section 5797, as amended, Laws of Missouri 1939, page 463, is the 2% gross premium statute to which you refer. The applicable part of this section reads as follows:

> "Every insurance company or association not organized under the laws of this state, shall, as hereinafter provided, annually pay tax upon the direct premiums received, whether in cash or in notes, in this state or on account of business done in this state, for insurance of life, property or interest in this state at the rate of two per cent per annum in lieu of all other taxes, * * * * *."

The Supreme Court of Missouri has several times determined that this statute, providing for a 2% gross premium tax, is an excise or privilege tax and is in no sense a tax on property; that it is a tax assessed for the privilege of doing business only. In the case of Bankers Life Company vs. Chorn 186 S. W. 681, the Supreme Court of Missouri en banc said the following in connection with this statute, l.c. 683:

> "It follows that the correctness of the conclusion reached in Northwestern, etc., v. Waddill, supra, depends upon the real character and purpose of the section of the statute (R. S. 1909, Sec. 7099), imposing a duty of 2 per cent. per annum upon the 'premiums' received by foreign insurance companies or associations on account of business done in this state, whether it was a property or a privilege tax. After mature consideration we are of opinion that this exaction was not intended to be a tax in the sense of an exercise by the Legislature of its power to tax property generally, but that it was in its essence an excise demanded for the privilege of plying the calling of insurance in this state, and was therefore not subject to the constitutional requirement of uniformity and equality, except as to the class affected, and applies directly to any class falling within its terms. 1 Cooley on Tax. (3d Ed.) pp. 6, 31, 72; Id. vol. 2, p. 1100; Black's Law Dict. title, Excise."

In the case of Massachusetts Bonding and Insurance Company vs. Chorn 274 Mo. 15, 201 S. W. 1122, the court in dealing with the 2% tax statute then in force, and which was in the same language as the present statute we have quoted above said:

> "The payment of the tax entitled it, under the laws of the state, to transact this business in its capacity as a corporation."

After quoting the tax statute in full, the court

in the above Massachusetts Bonding case said further:

> "It will be observed that the nature of the tax is a tax on 'business done' and not upon 'insurance furnished'".

The Supreme Court of the United States has also held that a state has no authority to impose a premium or excise tax on an insurance company when it has withdrawn from the state in question and is no longer licensed and is no longer issuing any policies of insurance in the particular state. This is true even though the company continues in force previously issued contracts of insurance from a place of business without the state. In the case of Provident Savings Life Assurance Society vs. Kentucky 239 U. S. 103, the court, speaking through Justice Hughes, said:

> "And we cannot doubt that the question whether the State is taxing a foreign corporation for a privilege not granted, that is, whether the acts done by the corporation at the time to which the tax relates are of such a nature as to subject it to the local authority upon the ground that it is doing acts which can only be done with the permission of that authority, must be regarded as a Federal question. Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (Louisville & Jefferson Ferry Co. v. Kentucky, 188 U. S. 385, 398; Del., Lack. & West. R. R. v. Pennsylvania, 198 U. S. 341, 358; Union Transit Co. v. Kentucky, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with

respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked.

It is not controverted that the Company, at the time in question, was not soliciting insurance or collecting moneys in that State. Further, it had no offices or agents in Kentucky. Upon the averments which stand admitted in the record it must be assumed that it was not performing any acts within the jurisdiction of Kentucky. It had sought to withdraw itself completely from the State. The conclusion that it continued to do business within the State, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that State and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the Company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the State's consent. But the continuance of the contracts of insurance already written by the Company was not dependent on the consent of the State. It is true that acts might be done within the State in connection with such policies, as for example in maintaining an office or agents

> although new insurance was not written or solicited, which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the State cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control."

It would follow, therefore, that since the Northern States Life Insurance Company and the Royal Union Life Insurance Company are in receivership and are no longer engaged in doing business in the State of Missouri as such corporations, that the excise or privilege tax cannot be assessed. This is true as against these two defunct companies which have not been doing business as such in the State of Missouri for a number of years. The Lincoln National Life Insurance Company has been doing business in Missouri during all the time in question, and the exact nature of the two reinsurance contracts must now be examined to determine whether the business of the two defunct companies has been so absorbed and assumed by the Lincoln as to render the Lincoln liable for the 2% premium tax as of this time.

From the contract it appears that the Lincoln is acting as trustee of the business and assets of the two companies and that neither the business nor assets constitute property of the Lincoln. In fact, the payment of death benefits and the other obligations of the Royal Union and the Northern States do not

become obligations of the Lincoln until December 31, 1948, unless it becomes possible to fully retire the policy liens prior to that time. In this connection, Section 32 of the Royal Union contract reads in part as follows (the word "company" refers to the Lincoln National):

> "All assets conveyed (excluding those covered by Paragraph 39 hereof) and sums paid by the Receiver to the Company, together with all net gains and profits from the business reinsured, and from the assets administered by the Trustees as hereinafter provided, shall constitute the Royal Union Fund. The Company shall separately account for the Royal Union Fund, and so set the same apart that it will not be subject to claims or demands by other policyholders or creditors of the Company. Assets of the Royal Union may be acquired by the Company at agreed upon values in the manner as hereinafter provided but the same shall still constitute a part of the Royal Union Fund. * * * * As provided elsewhere in this Contract, the policies assumed shall become (except for any final lien which may be determined) the obligation of the Company on December 31, 1948 or at such earlier date as the lien (including all additions thereto on account of unpaid interest and accrued interest) upon all policies shall have been completely removed and all matured endowments paid in full as provided in Paragraph 26. The contingency reserve shall not be regarded as a liability in determining when the lien upon all such policies shall have been completely removed. The Royal Union Fund shall

continue to exist until December 31, 1948, unless the lien is sooner discharged. Upon said termination, or discharge of the lien, the assets constituting the Fund with all incidents thereof shall be considered the same as other assets of the Company. The Company shall have the right to recover with interest at five per cent (5%) per annum out of the Royal Union Fund all amounts that it may advance to cover the payment of claims or other valid disbursements except such claims as the Company may be required to pay out of its own funds as provided herein."

Section 33 reads in part as follows:

"As stated in Paragraph 17, the Company shall render an accounting of all transactions pertaining to the business of the Royal Union as soon as practicable after the end of each calendar year as long as a lien exists against Royal Union policies but in no event after December 31, 1948. Such accounting shall be in the form of a Convention Annual statement, which shall be furnished to the Court and the Commissioners of Indiana and Iowa, and when approved by the Commissioner of Iowa shall be conclusive and binding on policyholders.

Until December 31, 1948, all net profits as defined herein, unless the lien is sooner discharged, shall inure to the use and benefit of the policyholders of the Royal Union

entitled thereto under this Contract. If said lien (including all additions thereto on account of unpaid interest and accrued interest) is discharged before December 31, 1948, the Company, at the time of such discharge, will assume the policies hereby reinsured according to their respective terms except as to those benefits which are definitely limited or modified by the terms of this agreement. All profits earned after discharge of the lien and in any event after December 31, 1948 shall become the sole property of the Company."

Section 40 provides in part as follows:

"If the insured named in any policy reinsured hereunder shall make application to the Company to have his policy exchanged for a new policy issued by the Company on its own form, such new policy to be free from the lien provided by this Contract, the Company may issue such new policy as applied for and credit thereto any amount to which the insured would then become entitled under the terms of this Contract. Any and all rewritten policies shall be considered Royal Union policies for the purpose of this Contract."

Section 42 provides as follows:

"For administration expenses incurred in handling the policies of the Royal Union, the Company shall receive $2.00 per thousand per annum for all policies

> except extended insurance policies and group insurance policies. The charge for administration expenses in connection with extended insurance shall be $1.25 per thousand per annum and for group insurance 75 cents per thousand per annum."

Section 49 provides in part:

> "It is specifically understood that the Company does not assume any liability of the Royal Union except as set out herein."

Section 53 provides in part that:

> "The Court shall retain exclusive jurisdiction over all matters pertaining hereto for the purpose of entering such other necessary and further orders, from time to time, as occasion may require."

It appears, therefore, that all of the assets conveyed to the Lincoln are to be maintained and administered separate and apart from the assets of the Lincoln and are to be administered as the Royal Union Fund; that the policy and other obligations are not to become direct obligations of the Lincoln until December 31, 1948, unless the lien is sooner terminated; that upon the discharge of the lien, or upon December 31, 1948, the assets constituting the "Royal Union Fund" are to become the property of the Lincoln; that in the meantime, all policy claims and other expenses in connection with the Royal Union policies are to be paid out of the fund itself and not out of the assets of the Lincoln, and if the Lincoln should advance any such items, it can recover the amounts so paid out of the fund with 5% interest.

It is further provided that the Lincoln shall make

an annual and separate accounting to the court and the Commissioners of Insurance of Indiana and Iowa. Even if a Royal Union policy is rewritten in the Lincoln, the new policy is to be considered a Royal Union policy. Also, the Lincoln receives a certain sum per $1,000.00 insurance as compensation for administering the business and assets.

It appears, therefore, that the business and assets of the Royal Union cannot now be considered as business and assets of the Lincoln National Life Insurance Company. While the provisions we have quoted herein are taken from the contract involving the Royal Union, it will be sufficient here to observe that the effect of the contract with the Northern States is substantially the same.

It appears, therefore, that the business and funds now being administered by the Lincoln are not now its own business, and it should not be required to pay the 2% tax out of the trust funds. The premiums are not received by the company nor do the same go into the assets of the Lincoln. The premiums go into the funds. The conduct of the Lincoln's business is separate and apart from its administration of these funds. In fact, if the management of the affairs of the Royal Union and Northern States had been carried on in the same manner by the original receivers, and if these reinsurance contracts had not been entered into, there would be no question but that the tax could not be imposed. The same would be true if the court had appointed individuals to manage these trust estates or if the reinsurance contracts in question had been entered into with an insurance company not licensed to do business in the State of Missouri. In other words, if the Lincoln National had never been licensed to do business in the State of Missouri, there would be no question that the tax could not be imposed.

Again, as to the nature of the contract in question, the Supreme Court of Indiana, in the case of Morthland v. Lincoln National Life Insurance Company, 25 N. E. (2d) 325, held that under the contract in question between the Lincoln National and the Northern States, the Lincoln held

"the bare legal title to those assets for the purpose of administering them in connection with the continuance of the insurance policies of the Northern States Life In-

surance Company which were outstanding, and that the equitable title continued in the trustee, the officer of the court."

For your further information, we are attaching copy of an opinion dated June 14, 1940, written by the Attorney General of the State of Minnesota and addressed to the Honorable Frank Yetka, Commissioner of Insurance of the State of Minnesota, in which the same result is reached on the same companies involved.

CONCLUSION

We conclude, therefore, that the premium tax statute provides a privilege or excise tax predicated on the state's grant of authority to transact the insurance business, and if no authority is granted, the tax cannot be collected.

Since the Royal Union Life Insurance Company and the Northern State's Life Insurance Company have been in receivership for a number of years, and are not now licensed to do business in Missouri, and since the business of these two companies has not at this time become a direct obligation of the Lincoln National Life Insurance Company, and since the Lincoln National is acting now in the nature of a trustee in administering the business and assets of said two companies, it follows that the 2% tax cannot be collected from either of the two companies or the Lincoln National at this time.

Following the year 1948, or at an earlier time, if the policy liens can sooner be lifted and the assets and business become a direct part of the assets and business of the Lincoln National, a different matter will be presented. However, there can be no purpose at this time in going into that future question.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

JFA:RT

INSURANCE: Disapproval of Articles of Association of the Kansas City Casualty Company for failure to supply affidavit of proof of publication.

December 31, 1940

1-V

FILED
55

Honorable Ray B. Lucas
Superintendent of Insurance Department
Jefferson City, Missouri

Attention: Mr. William G. Chorn

Dear Sir:

We have received your letter of December 23d in which you enclosed Declaration of Intention to Form an Insurance Company under Article VI, Chapter 37, Revised Statutes of Missouri, 1929, said Declaration comprising the Articles of Association of the Kansas City Casualty Company, of Kansas City, Missouri.

We have examined the above mentioned Declaration and Articles of Association but cannot approve same for the reason that the Affidavit of Proof of Publication, as required by Sections 5797 and 5799, Revised Statutes of Missouri, 1929, has not been complied with.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

MW:EG

CREDIT UNIONS: Authorized to invest funds under provisions of Section 5598a, Laws of Missouri, 1939, page 217.

January 2, 1940

FILED 56

Mr. Russell Maloney
Commissioner of Securities
Jefferson City, Missouri

Dear Mr. Maloney:

We wish to acknowledge receipt of your letter of recent date wherein you state as follows:

"We wish to call your attention to a matter which concerns the power of credit unions in making investments in securities. Section 5082, R. S. of Missouri, 1929, paragraph 3, recites the following powers:

'It may invest, through its board of directors, in the bonds of the United States, of any state thereof or of any municipality, the bonds of which municipality are legal investments for savings banks in the State of Missouri.'

The Sixtieth General Assembly re-enacted Section 5598 as Section 5598-a, on page 271 of the Session Acts of 1939, which seems to give credit unions the right to invest in stocks, shares or accounts of Building and Loan Associations, under certain circumstances, including the proviso, that such shares must be insured by the Federal Savings and Loan Insurance Corporation.

Section 5082 does not seem to have been amended or repealed, and the question arises as to whether or not credit unions may invest in the securities described in Section 5598-a, of the 1939 Session Acts.

> "We, therefore, respectfully request an opinion on this question, because of its very great importance to credit unions."

Section 5598a, Laws of Missouri, 1939, page 271, provides in part as follows:

> "Stock, shares, or accounts of any association doing business in Missouri under a charter issued by the state of Missouri or another state or the United States which has a contingent or general reserve fund of at least five per cent of its total assets, as shown by its last preceding semi-annual financial statement, or the shares of which are insured by the Federal Savings and Loan Insurance Corporation, shall be legal investments for * * * * * (2) the funds of all banks, trust companies, insurance companies, credit unions, business and manufacturing companies, loan and investment companies, mortgage loan companies, and associations or companies for benevolent or religious or scientific or fraternal-beneficial or educational purposes; and the provisions hereof are supplemental to, and amendatory of, any and all other acts regulating, relating to, and declaring what shall be, legal investments for any such funds;"

It is to be noted that the above section points out that it is supplemental to any and all acts regulating, relating to, and declaring what shall be, legal investments for any such funds.

There is a well-defined rule that the purpose of statutory construction is to determine the legislative intent. State ex rel. American Asphalt Roof Corporation v. Trimble, 45 S. W. (2d) 1103, 329 Mo. 495. In this case the intent is so clearly expressed that there is no room for construction. Cummins v. Kansas City Public Service Company, 66 S. W. (2d) 920, 334 Mo. 672.

From the foregoing, we are therefore of the opinion that credit unions may, in addition to the investments authorized under Section 5082, R. S. Mo. 1929, also invest their funds in the supplemental manner authorized under Section 5598a, Laws of Missouri, 1939, page 271.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:VC

SHERIFF: Entitled to mileage in more than one case where the same witness is used in more than one case.

January 3, 1940

1-6 FILED 57

Mr. G. F. Martin
Sheriff of Saline County
Marshall, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 29, 1939, which reads follows:

> "There were two cases pending in the Probate Court of Saline County. The plaintiffs were different parties but the same defendants were in both cases. The causes were set for different days, but the plaintiffs had subpoenaes issued in both cases at the same time, which were served on various persons who were witnesses in both causes. I desire an opinion as to whether or not the sheriff is entitled to charge mileage for serving the subpoenaes in both cases, and if not, in which case mileage should be charged."

In the case of Ring v. The Chas. Vogel Paint & Glass Company, 46 Mo. App. 374, l.c. 377, the court said:

> "Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer

> or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation. Miller v. Muegge, 27 Mo. App. 670; Shed v. Railroad, 67 Mo. 687; Gordons v. Maupin, 10 Mo. 352; Ford v. Railroad, 29 Mo. App. 616."

In view of the above authority the sheriff of Saline County can point to Section 11789 which partially reads as follows:

> "For each mile actually traveled in serving any subpoena * * * when served more than five miles from the place where the court is held * * * * ..... .10"

In view of the above partial statement of fees allowable to the sheriff, it will be noticed that the sheriff is entitled to ten cents per mile when serving any subpoena more than five miles from where the court is held. In other words, without taking into consideration any other facts, he is allowed the ten cents per mile as mileage. The same section also provides:

> "* * * provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

This limitation only applies in case the service on more than one witness is made in the same cause. This section of the statute is unambiguous and needs no construction, as was held in the case of State v. Thatcher, 92 S. W. (2d) 640, l.c. 643, where the court said:

> " * * * First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied. * * * "

If it had been the intention of the legislature that a sheriff should not be allowed mileage on the same witness in two different cases they would have plainly said so in this section, but, instead, they limited that restriction to mileage on more than one witness in the same cause on the same trip.

CONCLUSION.

In view of the above authorities, it is the opinion of this Department that the sheriff of Saline County is entitled to mileage in each case, even if the same witness, or witnesses, are used in both cases pending in the Probate Court of Saline County. The sheriff is limited to only charging mileage in each case for the several witnesses who are served on the same trip.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

COUNTY SHERIFFS: Discretionary powers of selecting jail under Section 8545, R. S. Mo. 1929, where county has no jail.

January 24, 1940

1-24

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your letter of January 22d, wherein you request an opinion on the construction of Section 8545, R. S. Mo. 1929, and ask the following questions:

"(1) Do you know of any law that gives the circuit judge authority to designate any jail the sheriff might use?

"(2) Does this law mean the nearest jail or the farthest jail?"

Section 8545, R. S. Mo. 1929, reads as follows:

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person

> or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

It is the opinion of this Department that when a prisoner is committed to the sheriff of any county, that if the sheriff in his discretion feels that the jail in his county is insufficient, or if some hazard has occurred wherein the jail has been destroyed, or where the county has no jail, then it is incumbent upon the sheriff, in the purview of the aforesaid section, to select a sufficient jail, in his discretion, in another county. And it is our view of this statute that the matter is discretionary with the sheriff in each and every instance where a prisoner is committed to him for safe keeping.

In conclusion, it is our opinion that Section 8545, supra, gives the sheriff discretionary powers in selecting a jail in another county in instances where he concludes that the jail is insufficient in the county in which he is sheriff or the failure of the county to maintain a jail, so long as he does not unreasonably abuse the discretion.

And in answer to your second question, "Does this law mean the nearest jail or the farthest jail?" it is our opinion that the word "nearest," as used in the section, means the nearest sufficient jail in the discretion of the sheriff.

Very truly yours,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney-General

W. J. BURKE
(Acting) Attorney-General

BRC:EG

CRIMINAL LAW: Voluntary surrender of evidence to a sheriff who has no search warrant is admissible in evidence.

January 26, 1940

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 21, 1939, which reads as follows:

"Herein is a motion to suppress certain evidence in a criminal trial to be heard and the defendant in the case is charged with a major crime.

"The facts are as follows:

"A man X disappeared in 1936. He was hunted far and wide and never has been seen alive. His partner in farming a farm was under suspicion, but the body had not been found then, and there was nothing against Y, the defendant and farm partner. At the time X disappeared he had on him a certain watch that can be definitely described by his relatives. About 3 years after his disappearance this same watch is supposed to have turned up in the hand of Y who was under suspicion all the time.

"In July, 1939, before the county grand jury Y was subpoenaed as a witness to testify of what he knew about the disappearance of his partner X. In the course of the examination he was asked about his watches, and he related the one he usually carried was broke and in the jewelry shop at the present time; and which was a fact, and he was asked about the other watch that he was reported carrying. He stated that he had such a watch but that particular watch was at his home. He told in detail where he obtained the watch and how long ago. He stated before the grand jury that he would produce the watch under request.

"Either the foreman of the grand jury or the prosecuting attorney asked the sheriff if he could go out to the farm home of Y and get the watch that was supposed to have been the property of Y. X was still before the grand jury and telling all he knew and answering any questions asked. His boy, of 17 years who had previously testified before the grand jury was sitting in the office of the sheriff awaiting for his father Mr. Y. The sheriff asked him if he knew where this other watch was that his father owned, and which was at home. The son said yes, he knew the watch and had carried it to school, and would go out to his home and get the watch for the sheriff to see. Permission was never asked of Y in the meantime for possession to get the watch. In fact Y did not know that the watch was being sent after.

"The sheriff took the son out to the farm home. The sheriff stopped in the drive way and waited by his car for the boy to go in the home and return with the watch in question. The son soon came back with the watch and his mother, wife of the D., and in presence of the sheriff and the wife, the son handed the watch over to the sheriff. The sheriff and the son returned back to the county seat. The sheriff asked a watch repairman if he could tell whether he had had this, the watch in his shop. The watch repairman looked on the inside of the watch case and found his mark, and a number that enabled him to turn to a certain page. On that page was a record of the watch, showing the exact number of the case and an exact number of the movement, with the name of X, the date, which was long prior to the time when X disappeared. The relatives of X examined the watch and did swear before the grand jury that the watch was the same kind and was the same watch that X owned and carried at the time of his disappearance.

"After Y had testified before the grand jury he went home. Later he was taken into custody, some time later, by the sheriff and the state highway patrol and questioned about this watch that belonged to X and which was in Y's possession.

"The grand jury did not indict Y.

"Later a skeleton was found in Morgan County, Mo, which has been identified by substantial proof as being the remains of X. All the case against Y

for the homicide of X, is circumstantial evidence, just like this watch evidence. I, as prosecuting attorney, filed a complaint against Y charging Y with homicide. Y has had a preliminary examination, and has been bound over to the circuit court.

"The D-Y is relying on State vs. Wright 336 Mo. 135-77 SW (2) 459, as the authority suppressing the evidence appertaining to the watch.

"I want an opinion as to whether this obtention of this watch was an illegal search and seizure under Article 2, and section 11, of the Mo. Constitution? Why would not this be a case of consent as set out in State vs. Tull 62 SW (2) 389-l.c. 392. D. was not in custody, under arrest, at the time the watch was obtained. D. was before the grand jury on a subpoena and was voluntarily testifying of all that he knew about the disappearance of X. In 77 SW(2) 459, the D. was in jail, when the evidence was procured out of the home of the D. by an illegal search warrant."

Section 11, Article 2, Constitution of the State of Missouri, reads as follows:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place

> to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Amendment 4, of the Constitution of the United States, reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The two principal sections of the state law, in regard to search warrants are as follows: Section 3769 R. S. Missouri, 1929, which reads as follows:

> "Upon complaint being made, an oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property."

Also, Section 3783 R. S. Missouri, 1929, many articles of property are therein set out which are subject to recovery on a search and seizure warrant, but because of the length of the section we are unable to set it out in detail. According to your request you state that the defendant was testifying before a grand jury in response to a subpoena issued from that body, but in the motion to suppress evidence which is attached to your request you state that the defendant was testifying before a grand jury in response to a subpoena issued from that body, but the motion to suppress evidence which is attached to your request states that the defendant was confined and imprisoned without a warrant.

I am assuming that the statement of facts as set out in your request is a true state of facts and this opinion is being based upon your request and not upon the motion to suppress evidence.

Your request does not state that the sheriff used any force to cause the seventeen-year-old boy to go with him to get the watch from the home of the defendant. It also states that the defendant stated that he would produce the watch under request.

Under the above state of facts the case of State v. Wright, 77 S. W. 2d 459, would not be applicable, for the reason that the defendant, while testifying before the grand jury was not under arrest, but was merely before the body in response to the subpoena. In that case the court, at page 462, said:

> "* * Our statutes on searches and seizures separately define the types or character of property for which search warrants may be issued and the conditions under which this extraordinary power of the state may be exercised,

> all of which must be particularized in a written, verified application. The specific requirements and the restraints of our statutes and of our Constitution are by way of protection of the rights gained by the American Colonies in the struggle against general warrants and writs of assistance. It is needless to say that no statute sanctions the issuance of a warrant to search the home of one charged with murder in order to secure evidence against the accused while he is in jail. In this case the application for a warrant to search appellant's house was made under authority of section 3769, p. 3306, Mo. St. Ann., which empowers a magistrate to issue a search warrant for any personal property that has been stolen or embezzled. This statute is declaratory of the earliest common-law use of a search warrant. 56 C. J. 1155; Buckley v. Beaulieu, 104 Me. 56, 71 A. 70, 22 L. R. A. (N.S.) 819."

The holding in that case was that the state was not allowed to search a home under a valid search warrant by way of subterfuge to obtain evidence in a murder case while the defendant was confined in jail. That is not the facts in the case as set out in your request, and the case of State v. Wright is not applicable. The court also in the case of State v. Wright, supra, said:

> "The cases make it clear that there may be a lawful search and seizure without a warrant, and there may be an unlawful search and seizure by officers armed with a warrant. The facts in each instance determine the legality of the proceeding. * * "

Under this holding all search warrants are subject to interpretation as to their legality under the facts in each instance.

In the case of State v. Tull, 62 S. W. (2d) 389, l.c. 392, the court said:

> "Appellant assigns as error the admission of the testimony of the sheriff and several officers who were with him showing the finding of the cultivator and its identification, on the ground that the sheriff was not armed with a search warrant, wherefore the search of the premises where the cultivator was found was illegal and any evidence thus obtained incompetent. The cultivator was found in a lot or field behind a barn on land which belonged to defendant, but at the time, according to his own testimony, was in charge of his tenant. It was not necessary to make a search except, perhaps, to go upon the premises far enough to see behind the barn. When the sheriff arrived he met defendant there and saw the car, which was in sight and had upon it the license number of the one he sought, and which defendant said was his. The sheriff then told him a cultivator had been stolen, and asked if it would be all right to search the premises without a warrant. Defendant at first demurred, and the sheriff, without then attempting to search, sent two officers to procure a search warrant. While they were gone, defendant voluntarily told the sheriff that the men who had gone for the search warrant 'had it in for him,' but if he (the sheriff) would 'go to town with him,' he might search without a warrant. The

> sheriff said he would, whereupon the defendant led the sheriff and the other officers to the cultivator and showed it to them. * * * * * ."

Under the holding in this case the court held that where a defendant voluntarily submitted to a search without a warrant, any competent evidence discovered under the search warrant would be admissible against him. Under the facts stated in your request the court hearing the motion to suppress the evidence would undoubtedly hold that since the defendant, while testifying before the grand jury, stated that he would produce the watch upon request, and the fact that his boy, without duress, went with the sheriff and entered the house and then brought the watch out to the sheriff, the evidence would be admissible upon the ground that it was voluntary produced as set out under the holding of State v. Tull, supra.

If the court should hold, under the state of facts, that the seventeen-year-old boy acted without authority and entered the home of his father and then gave the watch to the sheriff, who was sitting in a car outside of the house, he could further hold that this unlawful seizure by the seventeen-year-old son was not a violation of Article 2, Section 11, of the Constitution of the State of Missouri, or Amendment IV of the United States' Constitution. This reasoning was upheld in the case of State v. Pomeroy,130 Mo. 489, l.c. 499, where the court said:

> "In State v. Flynn, supra, Bell, J., speaking as the organ of the court, said:'It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or

where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owners. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his.'

"These authorities are conclusive on the question; there was no error, therefore, in admitting the evidence referred to.

"Furthermore, section 11, of our bill of rights, was intended as a restriction on the powers of government, and not designed as a restraint on the unauthorized acts of individuals. * * * "

Also, in the case of State v. Lock, 259 S. W. 116, l.c. 120, where the court said:

"It is stated in State v. Pomeroy, 130 Mo. 498, 32 S. W. 1002, that section 11, supra, is intended as a restriction on the powers of the government, and not a restraint on the unauthorized act of an individual. In Burdeau v. McDowell, 256 U. S. 465 loc. cit. 475, 41 Sup. Ct. 574, 576 (65 L. Ed. 1048, 13 A. L. R. 1159), the same conclusion is reached; the court stating:

"'The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases (Boyd v. U. S., 116 U. S. 616; Adams v. N. Y., 192 U. S. 585; Weeks v. U. S., 232 U. S. 383; Johnson v. U. S., 228 U. S. 457; Perlman v. U. S., 247 U. S. 7; Silverthorne Lumber Co. v. U. S., 251 U. S. 385; Gouled v. U. S., 255 U. S. 298), its protection applies to governmental action. Its origin and history clearly show that it was intended as restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of the unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.'"

Also, in the case of State v. Lee, 11 S. W. (2d) 1044, a prosecuting attorney, acting as a private citizen and accompanied by two other private citizens, inquired of the defendant if he could search his premises. He had no search warrant and the defendant permitted him to search the premises and the evidence found on the premises was permitted to be used, even though there was no search warrant and even though the prosecuting attorney was acting as a private citizen. In that case the court said at page 1045:

> "Appellant's constitutional right to freedom from unlawful search of his premises is said to have been invaded. Testimony offered by appellant tended to show that the search, concededly made without a search warrant, was made without his consent. The testimony of the prosecuting attorney and of Ettinger and Howard, given at the hearing on the motion to suppress evidence, tended to prove that appellant expressly and voluntarily consented and agreed that the search might be made without requiring the prosecuting attorney to go to the trouble of procuring a search warrant. In fact, the testimony of these witnesses tended to prove that appellant even aided in carrying out some of the liquor which he had in his house.
>
> "The issue of fact to be determined on the motion to suppress evidence was one for the trail(trial) judge. He evidently found that the search was made with the voluntary consent of appellant, and therefore that there was no unlawful search.

> Such finding was well supported by the proof offered on that issue. Hence no error was committed in overruling the motion to suppress evidence, or in admitting in evidence at the trial proof that eight gallons of whisky and other intoxicating liquors were found upon such search. If appellant voluntarily consented to the search, his constitutional rights were in no wise violated.
>
> "Even if the prosecuting attorney did go to appellant's home in the purported capacity of a private citizen, accompanied by two other private citizens, and, in such capacity, asked for permission to search appellant's premises without a search warrant, such considerations do not affect the admissibility in evidence of proof of liquor discovered by such search, if in fact such search was made, as the trial judge found, with the voluntary consent of appellant."

The three cases, set out above, undoubtedly hold that Section 11, Article 2, of the Constitution of the State of Missouri, and Amendment IV of the United States' Constitution are only intended as a restriction on the powers of government and not a restraint on the unauthorized acts of individuals.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the copy of Motion to Suppress Evidence attached to your request should not lie and should be overruled.

It is further the opinion of this department that the watch obtained, as set out in your request, is competent and admissible evidence and was not obtained in violation of Section 11, Article 2, of the Constitution of the State of Missouri, or Amendment IV of the Constitution of the United States.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

\JB:RW

MISSOURI DAIRY LAW: Creamery may refuse to buy cream from any producer so long as it does so on its own initiative and does not combine with others to refuse to buy milk products.

February 2, 1940

2-6 FILED 57

Honorable Jewell Mayes, Commissioner
State Department of Agriculture
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 15, 1940, which is as follows:

> "Please consider this a request for an opinion on Section 28-a in relation to Section 24 of the new Missouri State Dairy Law that went into effect on November 1, 1939.
>
> For simplification of wording, I am starting this request by identifying three terms as M, A and C, as follows:
>
> "M" is a milk producer.
> "A" is a cream station.
> "C" is a creamery.
>
> A and M offer to sell first grade cream at C. at the regular price then being paid to other sellers of first grade cream.
>
> C refuses to buy said cream from M, because he does not know under what conditions said cream is produced as required in Section 24 of the 1939 Missouri Dairy Law.
>
> Violation of Section 28a?
>
> C refuses to buy said cream from A, because he does not know under what conditions said cream is stored,

produced, handled or transported as required by Section 24.

Is this a violation of Section 28a? Is there a violation of Section 28a, if C refuses to buy said cream without giving any reason, and without the party refusing having consulted another creamery or creamery agent?

In order to violate Section 28a, does it not require the express or implied agreement of two or more to do the thing prohibited?"

Under the view we take, your two questions can be answered together. Section 28a of the new Missouri Dairy Law, found in Laws of Missouri, 1939, at pages 201 and 202, is as follows:

"It is hereby declared to be unlawful for any group of two or more expressly owned manufacturing plants or their agents to agree upon or fix prices of milk products, or to divide or assign any territory in the State of Missouri served by a cream buying station to any manufacturer licensed by this Act, or to assign or attempt to assign any cream buying station to any manufacturing plant, or to refuse to buy cream or milk offered for sale at the regular price then being paid by such manufacturing plant to other cream stations or sellers, or to agree not to purchase said cream or milk from said cream station or other seller, or to agree or attempt to agree that cream stations must, should or ought to sell their products to any particular manufacturer, and the violation of this provision shall constitute a felony, and upon conviction thereof shall be punished by imprison-

ment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

This statute is very similar to Sections 8702 and 8703 of the Revised Statutes of Missouri, 1929, commonly known as the Anti-Trust Statutes, and under which a number of decisions have been rendered by our courts. The substance of the two latter statutes, without setting them out in full, is a prohibition of all agreements, combinations, contracts or understandings made or entered into between any two or more persons made with a view to lessen lawful trade or full and free competition in the manufacture or sale of any products.

It appears that Section 28a, supra, defines six separate offenses, and makes the violation of each a felony. The statute makes it unlawful for (1) Any group of two or more expressly owned manufacturing plants or their agents to agree upon or fix prices of milk products; (2) for any group of two or more expressly owned manufacturing plants or their agents to divide or assign any territory in the State of Missouri served by a cream buying station to any manufacturer licensed by the new Dairy Law; (3) for any group of two or more expressly owned manufacturing plants or their agents to assign or attempt to assign any cream buying station to any manufacturing plant; (4) for any group of two or more expressly owned manufacturing plants or their agents to refuse to buy cream or milk offered for sale at the regular price then being paid by such manufacturing plant to other cream stations or sellers; (5) for any group of two or more expressly owned manufacturing plants or their agents to agree not to purchase said cream or milk from said cream station or other seller, and (6) for any group of two or more expressly manufacturing plants or their agents to agree, or attempt to agree, that cream stations must, should or ought to sell their products to any particular manufacturer.

The violation of the act is made a felony punishable as set out above.

As stated above, the Anti-Trust Statutes and Section 28a are very similar in their nature, and, in the absence

of any decisions, in interpreting the latter section, we quote from two decisions discussing the Anti-Trust Statutes. In Heim Brewing Company v. Belinder, 97 Mo. App. 64, l. c. 69, the Kansas City Court of Appeals said:

> "Any one may exercise a choice as to whom he will sell his goods, but he can not enter into a contract whereby he binds himself not to sell, for in such instance he barters away his right of choice, and destroys the very right he claims the privilege of exercising. After entering upon such agreement, he is no longer a free agent."

In Dietrich v. Cape Brewery and Ice Company, 315 Mo. 507, 286S. W. 38, l. c. 43, the Supreme Court of Missouri approved the foregoing case, and stated:

> "'Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally by independant action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder. Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691; State ex rel. v.

People's Ice Co., 246 Mo. (168) 221, 151 S. W. 101; State ex inf. v. Armour Packing Co., 265 Mo. (121) 148, 176 S. W. 382.'"

Both of the foregoing citations were quoted by our Supreme Court in Reisenbichler v. Marquette Cement Company, 108 S. W. (2d) 343, l. c. 345, approved without reservation. It appears, therefore, that any person may exercise a choice as to whom he will sell his goods or from whom he buys them so long as he acts individually, but that he is guilty of an offense when he combines or conspires with others to lessen free trade or competition.

In view of the foregoing authorities, it is the opinion of this department that a creamery may refuse to buy cream from any cream station or milk producer at any time so long as it exercises its individual discretion in the matter and does not combine or agree with others to refuse to buy from any milk producer or cream station.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC

SALES TAXES: Constable may not refuse to serve execution until he is paid for such service. A refusal to serve the same when it is delivered to him would render him and his bondsmen liable.

February 13, 1940.

2-14

FILED
57

Mr. W. G. Marbury
Attorney at Law
407 N. Eighth Street
St. Louis, Missouri

Dear Mr. Marbury:

We desire to acknowledge your letter of February 8, 1940, addressed to Mr. Joseph A. Lennon, which reads as follows:

"In attempting to administer the Sales Tax Act, we are confronted in some instances with the question which I feel should be called to your attention. It is necessary to relate the matter rather hypothetically to give you the full import of the situation.

"One of the inspectors or auditors working out of the local Sales Tax Office in St. Louis will call upon a merchant and arrive at an additional assessment of sales tax, or a delinquency where the merchant has failed to pay any tax. After arriving at a delinquency the inspector or auditor attempts to effect a collection at that time. In some cases the taxpayer tells the inspector that he will prefer that the assessment be run and the matter certified to the Attorney-General's office and judgment secured thereon for he knows of his own knowledge that in the great majority of cases no execution is ever run on delinquent Sales Tax judgments.

"This is the problem which I think needs to be called to your attention. It both complicates the administration of the Act in this

office and reflects upon the efficient operation of your good office, which I feel is not responsible for the condition.

"I have, myself, personally called upon Mr. Bockius in your office to run certain executions and have been informed by Mr. Bockius that in some cases he has great difficulty in getting the Constable to act unless costs are posted for the services rendered in running an execution. I am of the opinion that inasmuch as the State of Missouri is the holder of the judgment and that inasmuch as the Constable is performing a duty for and in behalf of the State, it is not imperative that costs of the execution be posted or guaranteed, and I know of no funds, either in the Attorney-General's office or in the State Auditor's office, which can be used for that purpose.

"As a result of this complication and misunderstanding on the part of many, I feel that it would be timely on your part to render or secure an opinion from the Attorney-General's Office in regard to the obligation of the Constable and I would appreciate it personally if you would cause Attorney-General McKittrick, whom I am sure we can depend upon for the utmost cooperation, to issue an instruction under his signature to the various constables of the City of St. Louis that executions on Sales Tax judgments here in the City should receive prompt attention by the various Constables.

"Assuring you of my constant cooperation and thanking you for your help and splendid attitude in the past, I remain,"

The rule as to compensation of a public officer, in a case wherein a County Collector sought fees not provided by statute, is stated in King v. Riverland Levee District, 279 S. W. 195, 196, as follows:

"It is no longer open to question but that compensation to a public officer is a matter of

> statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 Loc. Cit. 27, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra."

The same rule was restated in Nodaway County v. Kidder, 129 S. W. (2nd) 857, 860, wherein the court quoted a part of the above citation and added:

> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

In said decision the court, at l. c. 861, further said:

"The rule is stated in 15 C. J. 509, Sec. 176, as follows:'Money paid to a county officer to which he is not entitled by law may be recovered back, without previous demand, in an action for money had and received instituted by the county.'

"The rule is also stated as follows: 'As a general rule any compensation paid to a public official by the state or other governmental body not authorized by law, or in excess of the compensation authorized by law, may be recovered by the proper governmental body * * *.' 46 C. J. 1030, Sec. 285."

The rule is further stated in the case of State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 607, wherein the court says:

"We approach the examination of the question whether the State is liable to pay the relator's account for traveling expenses incurred by him in going to and returning from Washington, D. C., with the axiom, several times ruled by us to be fundamental, 'that no officer in this State can pay out the money of the State, except pursuant to statutory authority authorizing and warranting such payment.' (State ex rel. Bybee v. Hackmann, 276 Mo. 110; Lamar Twp. v. Lamar, 261 Mo. 171.) The only exception to this rule (and it is not in fact an exception) is 'that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties effectual, is conferred by implication.' (State ex rel. Bybee v.

> Hackmann, supra.) Under this rule we perforce must look to the statutes which created the office of Warehouse Commissioner and which prescribe his duties for authority to make our writ peremptory. It we find no such authority, either express, or which arises from such necessary implication as is above defined, it is manifest that we are without power to compel respondent to audit relator's expense account, for expenses incurred by him in going to and returning from Washington. * * * "

The Sales Tax Laws of 1935-7-9 provide a complete scheme of assessment, levy and collection of delinquent sales taxes. Do either of such laws contain a statute that may be pointed out by a constable, as authorizing, expressly or impliedly, payment or compensation from public funds for the official duties of such officers exercised in the collection of such delinquent taxes? We are unable to find such provision.

In event such laws do not provide for the payment of such fees and such officers were to obtain fees for such services - under the above rule - restoration of the fees illegally obtained could be compelled by suit for money had and received instituted by the county for,

> " * * * When a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds. Lamar Township v. City of Lamar, 261 Mo. 171, 187, 169 S. W. 12; State ex rel. Barker v. Scott, 270 Mo. 146, 153 192 S. W. 90; State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 536; State ex rel. Jarvis v. Dearing, Mo. App., 274 S. W. 477; Atchison County v. DeArmond, 60 Mo. 19."

Section 1220 R. S. Mo. 1929, is as follows:

"If any officer to whom any execution shall be delivered shall refuse or neglect to execute or levy the same according to law, or shall take in execution any property, or any property be delivered to him by any person against whom an execution is issued, and he shall neglect or refuse to make sale of the property so taken or delivered, according to law, or shall make a false return of such writ, then, in any of the cases aforesaid, such officer shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied; and if such officer shall not on the return of such writ, or at the time the same ought to be returned, have the money which he shall become liable to pay as aforesaid before the court, and pay the same according to the exigency of the writ, any person aggrieved thereby may have his action against such officer and his sureties upon his official bond, or may have his remedy by civil action against such officer in default."

Section 1221 R. S. Mo. 1929, is as follows:

"If any officer to whom any execution shall be delivered shall not return the same according to law and the command of the writ, such officer and his sureties shall be liable to pay the damages sustained by such default, to be recovered by the party aggrieved, by action upon the official bond of the officer, or by civil action against such officer."

In the case of The People v. Johnson, 14 Ill. 342, the court, in construing the right of the state to collect

a judgment under general statutory provisions, in following a rule stated in Corpus Juris, said:

> "The statute authorizes process of garnishment to issue whenever an execution is returned no property found, and an affidavit is made that the defendant has no property in possession liable to execution, and there is just reason to believe that another person is indebted to him, or has in his hands effects belonging to him. R. S. ch. 57, Sec. 38. This provision is general, and applies to all judgments. It clearly embraces a judgment in favor of the State. The State has the same rights, and is entitled to the same remedies, as any other judgment creditor. * * * "

Section 31 of the Laws of Mo. 1939, at page 868, provides:

> " * * * and in every such suit the process, pleadings and practice shall be except as in this Act otherwise specifically provided, according to the provisions of the Code of Civil Procedure." (Underscoring ours)

Section 33 of the Laws of Mo. 1939, is as follows:

> "It is expressly provided that the foregoing remedies of the State shall be cumulative, and that no action taken by the Auditor or the Attorney-General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which providion is made in this Act."

CONCLUSION

Therefore, it is the opinion of this department that a constable may not collect costs from the state for his official services with reference to sales tax cases and may not refuse to perform such official statutory services until such costs are paid by the state. It is further our opinion that the state has the same right, and is entitled to the same remedies, as any other judgment creditor and that when an execution is delivered to the constable, for the collection of sales tax, and he refuses to perform his official duty, he and his sureties become liable to pay the damages sustained by such default.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

DEPARTMENT OF AGRICULTURE:
EGG INSPECTION:

Rules and regulations prescribed by the Department of Agriculture for the enforcement of the egg inspection laws.

February 28, 1940

3-1

FILED
57

Honorable Jewell Mayes
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request this department to pass upon proposed regulations for the enforcement of the uniform egg law of Missouri. The regulations which you submit are as follows:

"(1) CANDLING OF EGGS: All eggs purchased from the producer, for resale for consumption, should be candled throughout the entire year, and a Candling Certificate MUST be placed in each case of eggs, sold within the State, in accordance with Section 13058, R. S., 1929, amended 1933 and 1939.

"(2) CANDLING NOT REQUIRED WHEN: When a local retail merchant purchases eggs from a licensed egg dealer for resale to his consumer customers, he need not re-candle such eggs, provided, the case or container in which the eggs are packed contains a legal candling certificate properly made out by the seller, showing the eggs had been properly candled by him within the last three days prior to the sale during the period from May 15 to September 15, and six days prior to the sale during the period from September 15 to May 15; however, nothing in this Regulation exempts

any dealer from the liabilities and duties provided in Section 13056 as amended. Under no circumstances is a local retail merchant or any other egg dealer exempted from candling all eggs received from producers or from dealers not properly using legal Candling Certificates.

"(3) CANDLING RECORDS TO BE KEPT: When one dealer purchases eggs from another dealer and candles such eggs as required by law, said purchasing dealer shall keep a record showing the name and location of the dealer from whom the eggs were purchased, the number of eggs candled out as unfit for human food, the remittance record showing deduction has been made for all inedible eggs, and the date of said candling.

"(4) PRODUCER NOT REQUIRED TO HAVE LICENSE: The producer from whom eggs are purchased shall not be required to have a l cense for selling eggs of his own production. If, however, this producer buys eggs for resale, he then becomes a dealer within the meaning of the law and must secure a license and comply with all requirements of the Uniform Egg Law.

"(5) EATING PLACE NOT REQUIRED TO HAVE LICENSE: Restaurants, hotels and all eating places, where all eggs purchased are cooked and served, but no eggs sold to consumers for home use, are not required to secure an Egg License.

"(6) INCUBATOR AND CANDLING ROOM REJECT EGGS: Incubator and candling-

room reject eggs are deemed and hereby declared unfit for human food. These and all other eggs unfit for human food may be trafficked in or transported only when such eggs shall have been broken in shell and denatured so as to prevent them from being used as human food; provided, however, that said incubator or candling-room reject eggs, or any other eggs unfit for human food, may be trafficked in or transported if in shell form only after said eggs have been thoroughly sprayed with kerosene so as to prevent them from being used for human food, and each case or container plainly labeled, 'For manufacturing purposes only'.

"(7) BREAKING PLANT REJECTS AND SHELL RINGINGS: All breaking-plant rejects, such as soured eggs, blood rings, spots or and other rejects, including the juice extracted from the shells by centrifugal force, ringing or any other method whereby the product thus extracted becomes contaminated with the filth and dirt from the outer surface of the shell, are deemed unfit for human food, and can be trafficked in or transported only after same have been denatured by adding a sufficient amount of kerosens, and cans or containers have been plainly labeled, 'For manufacturing purposes only'.

"(8) RELATING TO EGGS PURCHASED ON ROUTES: Any person or firm operating a truck or vehicle and huckstering and purchasing eggs from producers or dealers thereby becomes a trafficer in eggs within the meaning of the statute and must comply with the law relative to

license, and such license may be designated as a 'Huckster's License,' as well as all other sections of the Uniform Egg Law; PROVIDED, HOWEVER, that if such person or firm has an established and licensed place of business where all eggs thus purchased are candled and correct losses deducted from the rightful person, then said person or firm shall not be required to secure a license other than the one at the place of business. 'Huckster's' traveling licenses must always be carried on the vehicle when picking up eggs, and shall be shown to State Inspectors when such a request is made.

"(9) RELATING TO LICENSES: One license is not sufficient for several establishments, but each and every establishment, person or place dealing in eggs, including those who buy only on routes , must each have an Egg License in the name of the person owning or operating the business, including the address where the business is located. If what is commonly called a 'Huckster', the name of the town out of when he operates and the name of the business for which he operates, if not an independent dealer. A license is not transferable from one person or firm to another person or firm. No license can be legally moved from one city or town to another city or town, but may, upon written permission of the Commissioner of Agriculture, be moved from one location to another in the same city or town. All licenses expire on May 26th following date of issue, and there is no proration or reduction of the fee for a fractional part of the license year.

"(10) RULING UNDER SECTION 13066.

> With reference to placing Establishment Number on containers: All cans or containers shall have the Establishment Number stenciled, painted or embossed on the sides or bottoms, and if the number is placed on the lids it must also be placed on sides or bottoms. PAPER LABELS BEARING THE ESTABLISHMENT NUMBER ARE PROHIBITED."

Article IV of Chapter 93, together with the amendments thereto as appear in Laws of Missouri 1933, page 166, relates to the duties of the Commissioner of Agriculture with respect to the sale and handling of eggs in this state.

Section 13057 of said article provides for the regulation and the traffic of eggs.

Section 13058, R. S. Missouri 1929, provides for candling certificate.

Section 13059, R. S. Missouri 1929, provides for licensing of persons who handle eggs.

Section 13060, R. S. Missouri 1929, provides as follows:

> "That the state food and drug commissioner shall enforce the provisions of this article and shall make suitable rules and regulations for carrying out its provisions. He shall determine the conditions under which eggs previously candled shall be recandled before sale in order to safeguard the purchaser against buying as a prt of a lot eggs unfit for human food."

It is by virtue of the provisions of this section that you are authorized to make and promulgate the rules and regulations which you have submitted.

Section 13061, R. S. Missouri 1929, provides

penalties for the violation of the provisions of the foregoing sections of the article pertaining to eggs.

Section 13063, R. S. Missouri 1929, regulates the shipping of unwholesome eggs.

Section 13064, R. S. Missouri 1929, pertains to the "breaking stock" and prohibits the selling of certain eggs for food purposes.

Section 13065, R. S. Missouri 1929, pertains to the inspection of eggs and the license fees to be charged.

Section 13066, R. S. Missouri 1929, pertains to egg-breaking or manufacturing establishments and the regulation thereof.

It will be noted that all of these sections are under the jurisdiction of the Commissioner of Agriculture, and as stated above Section 13060 authorizes the Commissioner to make suitable rules and regulations for carrying out the provisions of the article.

We have compared the regulations which you have submitted with the foregoing sections of the statutes and we think that your regulations are consistent with the provisions of said article and that by virtue of the authority of said Section 13060 they would be deemed as suitable rules and regulations for the carrying out of the provisions of said Article IV of Chapter 93 together with its amendments thereto. However, in passing on these regulations we might suggest that your Rule (5) seems to be a little bit indefinite in the language "but no eggs sold to consumers for home use." We can understand that hotels, restaurants and all eating places where all eggs purchased are cooked and served are not required to secure an egg license, but we are just wondering what is meant by the clause "but no eggs sold to consumers for home use." This is a mere suggestion as to the form of this rule.

CONCLUSION.

We are, therefore, of the opinion that the foregoing regulations which you have submitted are authorized by the foregoing statutes and arein conformity to the provisions of said Article IV in Chapter 93, R. S. Missouri 1929.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

CONSERVATION COMMISSION:
CONVEYANCE IN TRUST:

Conditions under which Conservation Commission may become possessed of lands in Newton County, Missouri, conveyed in trust to the Izaak Walton League.

March 28, 1940

4-7

FILED
57

Conservation Commission
Jefferson City, Missouri

Attention: Mr. E. A. Mayes

Gentlemen:

This is in reply to yours of recent date wherein you request an opinion from this department based upon facts which are as follows:

> "Reference is made to your opinion rendered to us on May 5, 1939, in regard to land in Newton County which is owned by the Izaak Walton League of Joplin, Missouri, and which is used for the purpose of rearing fish to be distributed in public waters in Southwest Missouri. It will be recalled that when we asked for the previous opinion in regard tothis property, for some years this property had been exempt from taxation because of its public use and value to the fishing resources in public waters in Southwest Missouri. After Newton County had not levied taxes on the property for a number of years, a change in administration occurred and taxes were again levied on the property and the Izaak Walton League of Joplin requested that this property continue to be exempt from taxes because of the public nature of its use. Your opinion of May 5, 1939, provided that even though this property was serving the public at large, it could not be exempt from taxes because it was not actually in public ownership.

"We are again asked to participate in this situation and I am again enclosing the warranty deed to this property, made on January 30, 1932, which deeds the property to trustees for the Izaak Walton League. Since 1932 a considerable amount of very worthy development work has been done on this property by W. P. A. It is the kind of work which is ordinarily done on publicly owned property and only on publicly owned property. Higher authority than our State W. P. A. officials has determined that this property is not publicly owned and that therefore it was unlawful for this W. P. A. work to have been done on this property, and restitution is demanded of the Izaak Walton League for work done in neighborhood of $30,000.00.

"I have discussed the matter with W. P. A. officials and also with representatives of the Izaak Walton League. I have also read this warranty deed which provides that under certain conditions this property shall become the property of the State of Missouri. The legal question involved appears to be 'Do these trustees who now have title to this property have the authority, under the law, to deed this property to the State of Missouri or to the City of Joplin or to Newton County in which the property is located, or to Jasper County in which the property is not located?'

"For your information, we would prefer to see the property deeded to one of the local units of government instead of to the State. However, because of the worth-whileness of this property, the work which has been done upon the property, and the fish which have been distributed in public waters as a result of this development, and also because

of the desire on the part of the Izaak Walton League to be serving the public good, we expect to place the property in State ownership and under the jurisdiction of this department in case this appears to be the only feasible solution to this situation.

"In the event it should be necessary for this property to be deeded to the State of Missouri, could we lawfully enter into a long-time lease with the Izaak Walton League, this lease to have no consideration but merely turn the property over to the Izaak Walton League after it is deeded to the State of Missouri, with some provision for its continued use along present lines?

"From the standpoint of administration, it is our opinion that it would be preferable for this property to be deeded to some one of the local units of government. It is of further interest to note that the Joplin Chapter of the Izaak Walton League went to considerable expense in developing this project in addition to the funds which were expended by W. P. A.

"In the event any other solutions to this problem occur to you other than those which we have suggested in this communication, we would appreciate such advice. The principal question appears to be the authority of these trustees to deed this property and in the absence of authority to deed this property, the possible procedure and legality of any automatic reversion of the property to the State as provided in the deed.

"This appears to be something of an acute matter insofar as our State W. P. W. officials are concerned, and therefore an early opinion regarding a feasible solution will be appreciated."

You enclose a warranty deed from Dr. Otto Walter by which he conveys to certain parties as trustees a tract of land in Newton County, Missouri. In this trust agreement, which will be set out hereinafter, it seems that under certain circumstances the Conservation Commission may become possessed of the lands described in said deed. You also state in your request that federal funds, through the W. P. A. expenditures, have been expended on this land and since it is held by the Izaak Walton League, which is not considered a public body, then the League is requested to reimburse the federal department for the moneys so expended. That part of the deed which creates the trust is as follows:

"This conveyance and transfer is made upon the following uses and trusts and to the said Luther McGehee, Frank Holden and F. R. Hodgdon as trustees for the following purposes, to-wit: Upon the execution of these presents, the said Luther McGehee, Frank H. Holden and F. R. Hodgdon being invested hereby with the fee simple title to said real estate, shall at once enter and take possession of said real estate and said Trustee shall hold and administer said real estate in carrying out the present uses and purposes of Joplin Chapter No. 31 of the Izaak Walton League of America, said purposes being propagating and distributing fish and wild game of various kinds and description and further to use said property herein conveyed in any way that will advance the cause of conservation of outdoor resources and

recreation provided that, if the said Joplin Chapter No. 31 of the Izaak Walton League of America should at any time or for any reason abandon its chapter and cease to function as set out above, or should the said chapter cease to exist, the said trustees shall extend the privileges set forth above to any organization succeeding the said Chapter No. 31 of the Izaak Walton League, provided further that such organization so succeeding shall have for its purpose the same objective as now had by the said Chapter No. 31 of the Izaak Walton League.

"If and When a time arrives that the said Chapter of the Izaak Walton League fails to function and if there be no similar organization to succeed the said Chapter of the Izaak Walton League as set out in the above paragraph or if the perpetuation of this trusteeship should fail for any reason, then the title to the land herein described shall be vested in the State of Missouri for the uses of the State Fish and Game Commission or any organization succeeding the present State Fish and Game Commission, it being the intention of the party of the first part that this property shall be perpetually used for the furthering of interest in America's Great Outdoor as set forth in the principles of the Izaak Walton League of America.

"It is the intention of the party of the first part to make this trusteeship permanent and it is hereby provided and the trustees are empowered

as follows: In the event of death, refusal to act or removal from the State of any trustee or trustees, the remaining trustee or trustees shall select some other suitable person or persons to serve in the place or places of such trustee or trustees."

The general rule in construction of trust agreements is that if they are ambiguous then there is no reason for construction. Referring to the provisions of this deed, which set up the trust estate, it seems that the grantor in plain language provided that the trustees will hold this real estate and administer it in carrying out the uses and purposes of the Joplin Chapter No. 31 of the Izaak Walton League. This agreement does contain a provision whereby this land could finally vest in the Conservation Commission, but until the contingencies expressed in that agreement have come about, the lands cannot vest in the State Conservation Commission.

As we view this trust agreement, the only circumstances under which the State Conservation Commission could become possessed of this land would be when the Joplin Chapter No. 31 of the Izaak Walton League of America should abandon its chapter and cease to function, or if it should cease to exist, and in case the trustees extended privileges to any organization succeeding said chapter of the Izaak Walton League, having for its purposes the same as those of said Chapter No. 31 of the Izaak Walton League.

At another part of the agreement the grantor in this conveyance provided that if a time arrives when the Chapter No. 31 of the Izaak Walton League fails to function and if there be no similar organization to succeed that chapter, or if the perpetuation of the trusteeship should fail for any reason, then and in that event only would the title to the land vest in the State of Missouri for the use of the State Game and Fish Commission, or any organization succeeding the present State Game and Fish Commission which would now be the State Conservation Commission.

The grantor in the deed conveying the land finally expressed his intention to be that the property shall be perpetually used for the furthering of interest in America's great outdoors as set forth in the principles of the Izaak Walton League of America.

As this department views this contract, and the courts would be bound by the provisions of the contract in determining to what uses and purposes the land may be put, it does not seem that these trustees would have authority to deed the property to the State of Missouri or to the City of Joplin or to Newton County or to Jasper County in which the property is located.

CONCLUSION.

From the foregoing it is the opinion of this department that the only circumstances under which the State of Missouri may become possessed of the lands mentioned in the Walter deed, supra, is that when the Izaak Walton League fails to function, and if there is no similar organization to succeed that chapter of the Izaak Walton League, or if the perpetuation of the trusteeship should fail for any reason, then and in that event only could the land vest in the State of Missouri for the uses of the State Game and Fish Commission or any organization succeeded to the State Game and Fish Commission having the same purposes as that body.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

COMMISSION MERCHANTS: Cooperative marketing associations are not subject to the provisions of the statute applicable to commission merchants.

May 8, 1940

5-10

FILED 57

Honorable Jewell Mayes, Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Mayes:

This is in reply to yours of recent date wherein you request an opinion from this department based on the following statement of facts:

"We respectfully request your ruling as to the definition of 'commission merchant', given in Section 12648, Article 21, Chapter 87, R. S.--Mo., 1929 as follows: '(a) Every person, firm, exchange, association or corporation who shall receive, sell or offer for sale on commission within this state any kind of farm products, shall be deemed to be a commission merchant and engaged in the commission business.'

"Question 1: Does the definition of 'commission merchant' apply to such cooperative marketing associations as the 'Ozark Fruit Growers' Association', a copy of whose Constitution and By-Laws is attached hereto?

"The 'Ozark Fruit Growers' Association', is a 'parent' marketing association, with which are affiliated a number of local marketing associations dependent upon the parent association as a marketing agency.

"Question 2: Are such several local associations, handling products pro-

duced by their members, by virtue of their cooperative nature exempt from the requirements of the Missouri Commission Merchant Licensing Law?

"Question 3: Does your opinion on Question 1 apply to all cooperative marketing associations of similar organization?"

Together with your request we have examined the contract of the Ozark Fruit Growers' Association with its cooperative members and the articles of agreement and by-laws of that association.

Under Section 12648, as amended in Laws of Missouri 1939 at page 225, the term "commission merchant" is defined as follows:

"(a) Every person, firm, exchange, association or corporation who shall receive, sell or offer for sale on commission within this state any kind of farm products shall be deemed to be a commission merchant and engaged in the commission business. * * * * "

If the Ozark Fruit Growers' Association is a commission merchant as is defined under the foregoing definition, then it is subject to the provisions of Article 21 of chapter 87, R. S. Missouri 1929, which requires this association to obtain a license and to give a bond and provides for the punishment for the violation of the provisions of said article. The last section of this article, which is Section 12656, is an expression of the lawmakers to the effect that it was their intention that the General Assembly was providing for the exercise to the full extent of the regulatory and police powers of the state. By this section it is also clearly expressed that the lawmakers only intended that it apply to intra-state transactions.

The contract which you enclosed with your request is one with the Ozark Fruit Growers' Association and the

Aurora Fruit Growers' Association. By this contract it seems that the Ozark Fruit Growers' Association was to receive as compensation for its services three per cent of the gross proceeds of all cars of fruit sold or consigned to it for sale.

An examination of the articles of agreement of the Ozark Fruit Growers' Association shows that originally this association was incorporated under the chapter of the Revised Statutes governing manufacturing and business companies. The original purpose of the organization as is shown by Section 7 of its articles was as follows:

> "To provide ways and means for the growers of fruit and other farm products in the State of Missouri, Arkansas and other states and territories, to secure, by co-operation among themselves, and with railroads and express companies and by all other lawful means, the cheapest and best transportation services for their fruits and other farm products, and the proper distribution, marketing and sale of same."

It will be seen that this organization was formed not only for the purpose of serving Missouri growers but those of Arkansas and other states and territories. It will also be seen that it was formed with the idea of cooperation among the members of the organization. This corporation was formed before the non-profit Cooperative Association Act of Missouri was passed, but by Section 26 of the by-laws of this association it seems that since those associations which are affiliated with the Ozark Fruit Growers' Association participate in the surplus funds after the current expenses have been paid, then the Ozark Fruit Growers' Association and the affiliated associations are operating under what would be termed a non-profit cooperative plan. Said Section 26 of the by-laws is as follows:

> "If the report of the treasurer of the O. F. G. A. shows that there

> is a surplus of funds on hand in excess of the needs for the current expenses, the same shall be pro-rated to the affiliating associations of the past season on the basis of the amount of business done by each Association."

Section 24 of the by-laws of said association provides as follows:

> "Each local Association shall have its own local self government, rules and regulations, provided the same does not conflict with the rules and regulations of the O. F. G. A."

So it will be seen from the articles of agreement and the by-laws of the Ozark Fruit Growers' Association that the associations for which it acts as what may be termed the "parent" association go together and make up one and the same organization. In other words, the Ozark Fruit Growers' Association is only an arm through which the affiliated associations act for the purpose of the sale and distribution of their products.

We do not find any Missouri case directly in point on the question here involved, but in a Kentucky case the City of Owensboro et al. v. Dark Tobacco Growers' Association, 300 S. W. 350 at 352, wherein a similar set-up was under discussion and wherein the question of the relationship of the "parent" association to the affiliated associations and growers was discussed, and there the court said:

> "In determining whether an agreement between parties is a sale or whether it is a mere contract of agency, isolated expressions in the instrument indicating whether it is one or the other are not necessarily controlling; on the contrary the courts will ignore apparently inconsistent language

> used, and look to the real nature of the agreement between the parties, what its real purpose was, and what, from the nature of the transaction, must have been in the minds of the parties.
>
> "In this case the association not only was the creature of the growers, but by its charter it had no right to make a profit out of the handling or sale of their products. The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its members, who were all either growers or landlords.
>
> "A consideration of these facts makes it impossible that the parties could have had in mind any other thing than the creating of a sales agency in the execution of the several contracts. 22 R. C. L. p. 216; 2 C. J. pp. 420, 421; Haarparinne v. Butter Hill Fruit Growers' Association, 122 Me. 138, 119 A. 116."

As stated in that case, the Dark Tobacco Growers' Association was formed not for the benefit of the association but for the benefit of its members. So here the Ozark Fruit Growers' Association is not functioning for the benefit of the Ozark Fruit Growers' Association as an association but for the benefit of its members who are the affiliated associations which go to make up the Ozark Fruit Growers' Association.

The Ozark Fruit Growers' Association is merely a marketing association of the strawberry and fruit growers which is created and organized for the purpose of advantageous marketing of the various fruit growers' associations of that section of the state. As stated

in your request, you say that the "Ozark Fruit Growers' Association" is a "parent" marketing association with which are affiliated a number of local marketing associations depending upon the "parent" association as a marketing agency.

CONCLUSION.

From the statement contained in your request, and from an examination of the contract enclosed together with suggestions and the by-laws and articles of agreement of the Ozark Fruit Growers' Association, and from the consideration of the statutes hereinbefore referred to, and the Kentucky case cited, it is the opinion of this department that the term "commission merchant" as defined in said statutes does not apply to such a cooperative marketing association as the Ozark Fruit Growers' Association, or to any other cooperative association which operates on the same or similar plan.

Respectfully submitted

TYLER W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TW :DA

AGRICULTURE: Moniteau County Agricultural and Mechanical Society properly incorporated and elegible for State aid.

5/17

May 11, 1940.

FILED
57

Honorable Jewell Mayes
Commissioner of Agriculture
Jefferson City, Missouri

Dear Mr. Mayes:

We wish to acknowledge receipt of your letter under date of April 18th, together with transcript of record. Your letter reads as follows:

"The present officers of the Moniteau County Fair, are desirous of knowing as to whether they are legally authorized whereby they would be eligible for "State Aid" under the State Aid Law to County Fairs and Agricultural Exhibitions, as found in Agricultural and Mechanical Society Article in Chapter 87 of Revised Statutes, 1929, as unamended.

"The officers of the Moniteau County Fair have submitted to me the enclosed transcript of the record in the Moniteau County Court, California, Missouri, as made on Tuesday, August 9, 1859.

"I am advised by the Fair officers that this organization has been alive and a going concern since 1859. There was a temporary cessation almost wholly during three years of the Civil War, but there was no purposed suspension of the activities of the Fair at any time since it was organized, and a very good fair was held in 1939.

"May I have your opinion upon this inquiry, thanking you in advance?"

The following is the transcript of the record:

"State of Missouri) In the Moniteau County
) Court August Term 1859
County of Moniteau) Tuesday, August 9th 1859.

"Now at this day comes J. D. Adams and presents a petition signed by at least fifty freeholders of Moniteau County setting forty the facts that they desire to organize and be incorporated as a body politic for the purpose of promoting improvements in Agriculture, Manufacturing and the raising of Stock. And the Court being satisfied that such petitioners are freeholders of said Moniteau County in the State of Missouri, The Court doth therefore Order and Declare said petitioners incorporated and a body politic and corporate by the name and style of the Moniteau County Agricultural and Mechanichal Society and by that name they and their successors shall be known in law regulating such Societies and corporations according to an act entitled an Act to authorize and encourage the establishment of Agricultural Societies in the several counties in this State and Regulate the same, approved November 23d 1855.

"State of Missouri)
) SS.
County of Moniteau)

"I, Wm. G. Howard, Clerk of the County Court within and for the County aforesaid do hereby certify the above and foregoing to be a true copy of an order made by said Court on the 9th day of August 1859 as fully as the same appears of record in my office.

"In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at office this 10th day of August 1859.

"(L. S.) Wm. G. Howard, Clerk

By W. C. Hall D. C.

"Filed August
Wm. G. Ho
By W. C. Hall D. C.

"STATE OF MISSOURI)
) SS.
COUNTY OF MONITEAU)

"I, CHAS. C. TREIBER, Clerk of the Circuit Court and Ex-Officio Recorder of Deeds within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of the record of the Articles of Incorporation of the MONITEAU COUNTY AGRICULTURAL AND MECHANICAL SOCIETY as fully as the same appears of record in my office in Deed Record Book No. G at Page 79.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in CALIFORNIA, MISSOURI this 7th day of NOVEMBER A. D. 1939.

Chas. C. Treiber
Clerk Circuit Court and Recorder
Moniteau County, Missouri.

(SEAL)

By R. H. Mueller Deputy."

Section 12484 of Article 8, Chapter 87, R. S. Mo. 1929, provides how Agricultural and Mechanical Societies may be organized:

"Whenever fifty or more freeholders within this state shall present a petition to the county court of the county in which they or a majority of them reside, stating therein that

they desire to organize and be incorporated for the purpose of promoting improvements in agriculture, manufacture and the raising of stock, and setting forth in said petition the name and location to be adopted by said proposed incorporation, said name to be 'The (name of county) agricultural and mechanical society of (name of town or city where the office of said society is to be located,' and the court shall be satisfied that such persons are freeholders of this state, the court shall, by order, declare the petitioners incorporated for the purpose specified in this section, and thenceforth the petitioners shall be a body politic and corporate by the name and style adopted as aforesaid, and by that name they and their successors shall be known in law, have perpetual succession, sue and be sued, plead and be impleaded, defend and be defended, in all courts and in all actions, pleas and matters whatsoever, and shall have power to purchase, hold, lease, rent and receive any quantity of land not exceeding one hundred acres, with such buildings and improvements as may be placed thereon, and any other property, not exceeding in value one hundred thousand dollars; and may, by vote, determine that thereafter the members of said society shall be composed of such persons as shall subscribe at least one share of the capital stock thereof, in shares not exceeding twenty-five dollars each, said shares to be personal property and transferable by agreement; but no transfer shall be binding on the society until reported in writing and approved by the board of directors. The amount of such capital stock shall, from time to time, be fixed by the stockholders or board of directors, provided the same shall at no time exceed one hundred thousand dollars, and said board of directors may convey, lease sell and dispose of the property of the society, or any part thereof, for the benefit of the society,

and have a common seal, and break and alter the same at pleasure."

The transcript of record reveals that the Moniteau County Agricultural and Mechanical Society was ordered incorporated by the Moniteau County Court on August 9, 1859. The society was organized under an act approved November 23, 1855. Section 1 of said Act (R. S. Mo. 1855, Vol. 1 Page 182) is in substantially the same language as Section 12484, supra, with the following exceptions.

In 1855 the societies could hold land not exceeding thirty acres and have property in value not exceeding ten thousand dollars. Under the present law they may hold land not exceeding one hundred acres and have property in value not exceeding one hundred thousand dollars. A further exception is that under the present law the society "may" by vote determine that thereafter the members of the society shall be composed of such persons as shall subscribe at least one share of the capital stock.

It is evident then that there is nothing in the present law which would make the original incorporation ineffective.

Section 12495 R. S. Mo. 1929, provides that a duly authenticated copy of the order of the county court shall be filed and recorded in the office of the Recorder of Deeds:

"A duly authenticated copy of the order of the county court, provided for in section 12484, shall be filed and recorded in such manner as conveyances of land are by law directed to be recorded in the office of the recorder of deeds of such county within three months after such order shall be made. No society organized by virtue of this article shall be authorized to do business as such society until such duly authenticated copy shall have been filed and recorded in the manner herein set out."

This was also the requirement made by Section 12, R. S. Mo. 1855, Vol. 1, Page 185, with the exception that the latter did not contain the further provision that the society was not authorized to do business until the order was recorded. The transcript of record reveals that said order was filed and recorded in the office of Recorder of Deeds.

Under the original statutory authority (Section 1 R. S. Mo. 1855, supra) and as the same exists presently (Section 12484 R. S. Mo. 1929, supra), the society is given perpetual succession. You state that you are advised there was a temporary cessation of the corporation for almost three years, but that there has been no suspension of activities at any time since it was organized in 1859.

Fletcher Cyclopedia of Corporations Vol. 16, Section 8068, Page 849, declares: "that mere temporary suspension of business by a corporation * * * is no ground for the forfeiture of its franchise where there is no injury to the public * * * " and Section 8062, Page 843, declares that: "it must be intentional and wilful and be something more than a single ommission to exercise corporate functions. Where non-user is the ground of forfeiture, it is said that it should be 'total and clear'". (See also State v. Societe Republicaine 9 Mo. Appeal 114, 120; State v. Delmar Jockey Club 200 Mo. 34).

Irrespective of whether there were grounds for forfeiture by reason of non-user there is presently no grounds for forfeiture. Fletcher declares in Vol. 16, Section 8064, Page 845 that: "It is held that abandonment of corporate powers is no ground for forfeiture where such powers have long been resumed."

Section 12503 R. S. Mo. 1929, Page 217, provides for the granting of state aid to incorporated organizations conducting county wide agricultural exhibitions:

> "It is further provided that for the fostering and developing of agriculture in such counties as do not have within their borders a

county or district fair, the said board of agriculture may pay to incorporated organizations conducting county-wide agriculture exhibitions, thirty per cent. of premiums on grains paid out at such exhibitions: Provided, that such agricultural exhibitions are conducted by an organization showing by its officers and board to be of county-wide character, and offering premiums to the citizens of the entire county. The payments specified under this section shall not be subject to the provisions set forth in section 12502 for an additional ten per cent. payment."

From the foregoing we are of the opinion that the Moniteau Agricultural and Mechanical Society is properly incorporated under Article 8, Page 87, R. S. Mo. 1929, and eligible for state aid within the provisions of said article.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting)Attorney General.

MW/mc

BUILDING AND LOAN ASSOCIATIONS: (1) Effect of voluntary liquidation upon charter; (2) and reorganization of corporation that has voluntarily liquidated but not dissolved.

January 24, 1940 11/26

FILED 58

Honorable J. W. McCammon
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of January 4, 1940, as follows:

> "I. When a building and loan association goes out of business by process of voluntary liquidation, as provided by law, under certain conditions, what is the status of the charter of the aforesaid retiring association?
>
> II. Does the charter automatically die when the association quits business, or does it survive?
>
> III. And if the charter does survive, can it be sold and used by persons who might be interested in organizing a new building and loan association? For more specific example, could the charter of a retiring association be used in starting a new association to operate under a new name?" (numbering of paragraphs ours)

We are presuming that under the request for this opinion that the voluntary liquidation set out therein was not a proceeding either in law or by an agreement of all the stockholders for a complete dissolution. The method for a dissolution of a corporation under the general law was enacted in the Laws of 1921, page 264, now Section 4562, R. S. Mo. 1929, which reads in part as follows:

> "* * * * And whenever, by unanimous vote of all the shareholders, a resolution shall be adopted favoring the dissolution of said corporation, after the payment of all debts, claims or bills, then said corporation may be dissolved without suit by filing an affidavit of dissolution with the secretary of state, setting forth the above facts, and when said affidavit of dissolution is filed it shall be taken as prima facie evidence of such voluntary dissolution."

Under the above section it is noticeable that the procedure of dissolution is not mandatory for the reason that it uses the term "then said corporation may be dissolved without suit." There is no question but that, in order to dissolve a corporation, procedure must be followed as set out by law.

The terms "liquidation" and "dissolution" have been defined thusly:

> "'Dissolution' of a corporation is the termination of its corporate existence in any manner, whether by expiration of the charter, decree of court, act of the Legislature, etc. Cyc. L. Dict. (2d Ed.) p. 318. It becomes civiliter mortuus. 'Liquidation' of a corporation implies the winding up of the affairs of the corporation and settlement with creditors. Lafayette Trust Co. v. Beggs, 213 N. Y. 280, 283, 107 N. E. 644; Assets

> Realization Co. v. Howard, 70 Misc. 651, 676, 127 N. Y. S. 798. Both involve, imply, intend, and contemplate the end of the corporate existence." New York Title & Mortgage Co. v. Friedman, 153 Misc. 697, 276 N. Y. Supp. 72.

In the case of Sunriver Stock and Land Co. v. Montana Trust and Savings Co., 262 Pac. 1039, l. c. 1043, the court made this statement:

> "The grant of the franchise to be a corporation is an exercise of the sovereign power of the state, creating a contract between the state and corporation and its members. 'The consent of the state is expressed in the grant, and that of the corporators in the acceptance of the privilege.' Beyer v. Woolpert, 99 Minn. 475, 109 N. W. 1116. The corporation being granted life by the act of the sovereignty, nothing less than the act of that power, or the lapse of the period of life provided by law, or the dissolution of the corporation by the permission of the sovereignty, can take that life away. And this is true whether the corporation be de jure or de facto. It is true, of course, that under some conditions the functions of a corporation may be in abeyance, but nevertheless its existence as a corporation continues."

In the case of Estel v. Midgard Inv. Co., 46 S. W. (2d) 193, l. c. 195, the court quoted with approval the following:

> "The Legislature may confer jurisdiction on a court of equity to decree the dissolution of a corporation, but

> cannot confer such power upon an executive officer, since such power is judicial and not executive. 7 R. C. L. 724, 733."

And in the same opinion, the court had this to say (l. c. 196):

> "The constitutionality of the statute empowering the secretary of state to declare a forfeiture of a corporate charter has never been passed on by our Supreme Court. Its constitutionality was not questioned, in the present case, in any manner in the court below. It must, therefore, in the disposition of this case, be taken as valid, and given effect according to its true intent and purpose."

Therefore, in examining Chapter 35, Article 2, Revised Statutes of Missouri, 1929, and amendments that have been made by the Legislature from time to time, including the amendments of 1939, we find that the State of Missouri through its Legislature has set up a complete method by which building and loan associations may be formed and it is true that the Laws of Missouri, 1939, at page 268, Section 5627, states that the Supervisor of Building and Loan Associations can take charge of the assets of building and loan associations under the conditions therein set out. This section also provides for the resumption of business whenever according to law it is able to continue business.

Also, under Section 5626, Laws of Missouri, 1939, page 266, assignment of assets is prohibited without first taking the matter up and with the approval of the Supervisor of Building and Loan Associations.

But, from careful study, we are unable to find any statement in the statute which provides that the charter of a building and loan association shall be cancelled or declared void or extinguished in any manner by the Supervisor of Building and Loan Associations. And in the light of the definition

and the very nature of a voluntary liquidation, as differentiated from "dissolution," and in the light of the cases heretofore cited, we are of the opinion that when a voluntary liquidation is had in the manner set forth in your statement, that the functions of the corporation may be in abeyance, but its existence as a corporation continues and the charter does not die; and the only way that complete destruction of the charter can be brought about is that the same shall expire or be dissolved by court action, for it has been said in Section 8002, Fletcher's Cyclopedia, Corporations, Vol. 16, page 766, as follows:

> "But since a corporation may exist without any assets at all, it necessarily follows that it is not dissolved de jure by the mere fact that it is insolvent, and unable to pay its debts,"

and cites the following cases: Title Guaranty Trust Co. v. Sessinghaus, 325 Mo. 420, 28 S. W. (2d) 1001; Ready v. Smith, 170 Mo. 163, 70 S. W. 484; F. G. Oxley Stave Co. v. Butler County, 121 Mo. 614, 26 S. W. 367.

And in the case of Luehrmann v. Lincoln Trust & Title Co., 192 S. W. 1026, l. c. 1031, the court said:

> "Objection is made to the notice by which this meeting was convened. We attach no importance to this; for the law under which it is now claimed the action of the meeting was taken does not authorize the stockholders to dissolve the corporation, but to 'adopt a resolution favoring a dissolution,' upon which the dissolution may be accomplished by the judgment or decree of a circuit court, application for which must be made by petition, and notice given to 'all persons interested in such corporation' by summons. It is evident that no effort was made to proceed under this authority, or in any other way that would bring the appellants into court to assert their claim or try their right. While a corporation of this character may forfeit its charter by misuser or nonuser,

> there is no way by which it may declare itself dissolved, without adjudication, as against a right depending upon its continued corporate capacity. It may, perhaps, under special circumstances, discontinue its business and wind up its affairs with due regard to the rights of all those interested in its assets or activities, but its corporate character remains until the state shall resume it."

I

In conclusion, it is our opinion, in answer to your question No. I, which question is as follows:

> "When a building and loan association goes out of business by process of voluntary liquidation, as provided by law, under certain conditions, what is the status of the charter of the aforesaid retiring association?"

that the charter is in abeyance or stalemated, waiting for the same to be destroyed by appropriate court action, or that all necessary things be done that are required by Chapter 35, Article 2, R. S. Mo. 1929, and subsequent statutes, pertaining to building and loan associations, to the end that the corporation is given strength to carry on the functions, duties and obligations in the light of these statutes, supra, which is under the direction, supervision and acquiescence of the Supervisor of the Bureau of Building and Loan Supervision.

II

In answer to your second question,

> "Does the charter automatically die when the association quits business, or does it survive?"

we are of the opinion that the charter survives for the reasons heretofore set forth.

III

And in answer to your third question,

> "And if the charter does survive, can it be sold and used by perons who might be interested in organizing a new building and loan association?"

we are of the opinion that the answer to this question is "Yes"; provided, however, that it would be within the discretion of the Supervisor of the Bureau of Building and Loan Supervision, and before the organization of a new building and loan association could operate as such, the acquiescence and authority would first have to be obtained from the Supervisor and a strict compliance with the statutes as contained in Chapter 35, Article 2, and subsequent statutes, R. S. Mo. 1929, so that the corporation would be restored to its former condition of successful operation and solvency.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

BRC:EG

BUILDING & LOAN ASSOCIATIONS: Supervisor may, without resorting to legal process, take charge of an association and its assets and manage and conduct its business.

January 25, 1940

FILED 58

Mr. J. W. McCammon
Building and Loan Supervisor
Jefferson City, Missouri

Dear Mr. McCammon:

We are in receipt of your request for an opinion under date of January 22nd, as follows:

> "I will appreciate, at your earliest convenience, legal advice from you as to how much scope the law gives the building and loan supervisor in the matter of taking charge of a building and loan association in advance of the appointment of the supervisor as receiver? There seems to be a difference of opinion among building and loan executives as to what the law permits a supervisor to do by way of taking charge of an association unless and until a court order has been issued appointing the supervisor temporary receiver.
>
> "In the case I have in mind, we are hoping to avoid a receivership if we can get the action we deem necessary without going into court."

Section 5626, Laws of Missouri, 1939, page 266, provides when the supervisor of building and loan associations may take charge of an association, in part, as follows:

> "No association shall cease to do business or attempt to make a voluntary assignment of its assets or in any other

other manner to liquidate its affairs prior to the maturity of all its stock, except with the consent of two-thirds of its stockholders and the approval of the supervisor of building and loan associations as hereinafter provided. If any association attempts to make such an assignment, the supervisor shall upon his own initiative take charge of the association and of its assets and shall manage and conduct its business. Or if it shall appear to the supervisor from any report of such association or from any examination made or caused to be made by him, or from any knowledge or information obtained from any other source, that such association has committed a violation of its charter or is acting unlawfully, or that such association is conducting its business in an unsafe or unauthorized manner, or that the assets of any such association are insufficient to justify the continuance of business by such association, or it shall appear to the supervisor that it is unsafe or inexpedient for any such association to continue to transact business, the supervisor shall communicate the fact to the officers or directors; such officers or directors shall be allowed sixty days in which to make the assets sufficient or to correct the illegal practices. In case such assets are not made sufficient, or the illegal practices corrected within a time fixed by the supervisor, or if the directors request the supervisor so to do, the supervisor shall take charge of the association and its assets and manage and conduct its business. On taking possession by the supervisor no further payments shall be made to withdrawing shareholders, and all notices of withdrawal filed theretofore or thereafter shall be of no force and/or effect. The possession of the

supervisor in charge of the affairs and assets of such association shall be construed as the possession of the state of Missouri and the placing of said property in the hands of said supervisor by the directors and/or the taking of possession by the supervisor and his appointment as receiver of said property by the circuit court, as provided in this article, shall not be construed as a proceeding on account of insolvency or that said association has committed an act of bankruptcy; but the said supervisor shall promptly proceed and continue to collect dues and interest from the stockholders and borrowers of the association and may bring and/or defend suits in the name of the association and may authorize and direct the foreclosure of deeds of trust and/or mortgages, and pay its operating expenses and in his discretion its debts to its general creditors, employ such help as he needs to manage and operate said association, including, if necessary, a local assistant deputy to represent the supervisor in his absence from the county, and a local attorney to represent him in all legal proceedings: Provided, however, that all payments of dues made by members during the management or control of the association by the supervisor shall be kept in a special trust account, and in case of final liquidation shall be repaid or accounted for to such shareholders or borrowers in full without any reduction. The supervisor shall promptly attempt to reorganize said association, bring about a merger with other building and loan associations and/or seek the assistance of other associations, banks and/or trust companies to dispose of any part of the assets of said association that he deems advisable, keeping in view the resumption of business by said association. * * * *"

Under the above section, if an association attempts to make a voluntary assignment of its assets without the consent of the shareholders and the supervisor, the latter, it is provided, "shall upon his own initiative take charge of the association and of its assets and shall manage and conduct its business.

Again, if the supervisor learns from any source that the assets of an association are insufficient, or that it is conducting illegal practices, and upon the giving of notice to the directors or officers of the condition of such association, the latter fail to correct same, it is provided that "the supervisor shall take charge of the association and its assets and manage and conduct its business."

And again, if the directors request the supervisor to do so, he "shall take charge of the association and its assets and manage and conduct its business."

Section 5627, Laws of Missouri, 1939, page 268, provides when the supervisor may ask the court for a receivership, in part, as follows:

> "Upon taking charge of an association under any of the provisions of this article, the supervisor shall as soon as practicable, ascertain by a thorough examination of its affairs, and appraisal of its assets, its financial condition; and if from such examination and appraisal it appears to the supervisor that such association is in a condition to safely resume business, he shall return the assets and the conduct of the association to its officers and directors. The supervisor may at any time after he takes charge of the assets and the affairs of an association, institute proceedings in the circuit court in the city or county in which said association has its principal office, and have himself appointed temporary receiver, until it is determined whether or not such association can resume business;

or appointed receiver for the purpose of winding up its affairs, and the court shall upon such application, appoint the supervisor such receiver; and as such receiver the supervisor under order of the court in such proceeding may compromise and settle with the borrowers of such association the amount of credit to be allowed any loans on account of the value of the stock held as collateral to such loan, and on payment of such loan the supervisor may satisfy and release of record the mortgages and/or deeds of trust securing said loans; and in any reorganization may set up reserves to care for any losses theretofore sustained or thereafter suffered, including the costs and expenses of the reorganization or liquidation of the association's affairs to be accounted for pro rata as deductions from the value of the stock of withdrawing members of the association; said supervisor during his administration of the affairs of said association to have all the powers, duties and authority of the board of directors, subject, however, to the order of said court in the event of the sale of any assets of said association; to declare dividends and make partial payments to stockholders in partial or full liquidation of their shares of stock, said dividends or payments to the stockholders, however, shall be made pro rata in proportion to their stock holdings, no preference being given or allowed to any stockholder on account of any notice to withdraw having been filed or on account of the maturity of his stock. The court upon application of the supervisor shall have the right to remove the officers and directors of said association and to call a meeting of the stockholders for the election of new directors upon such notice as the court shall determine. The supervisor may submit to the court any general plan

> of reorganization of such association or merger or consolidation of such association with another association, and the court may submit such plan to the stockholders for approval or disapproval, but no such action of the stockholders shall be binding on the court but be advisory only, and the court may approve or reject such plan of reorganization, merger, or consolidation. Any stockholder of the association may be made a party to such proceedings and be heard by the courts as to his objections to such reorganization plan. * * * *"

Under the above section, "the supervisor may at any time after he takes charge of the assets * * * institute proceedings in the circuit court * * * and have himself appointed temporary receiver * * * or appointed receiver * * *."

As pointed out, there are three instances under Section 5626, supra, in which it is declared that the supervisor shall take charge of the association and its assets and manage and conduct its business.

In the case of State v. Wymore, 119 S. W. (2d) 941, l. c. 944, the court in construing the terms "may" and "shall" as used in statutes, said:

> "On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They are used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

Thus we find that it is mandatory under three different circumstances for the supervisor to take charge of an association and its assets and to manage and conduct its business. However, when he takes them over, it is permitted, but not mandatory, that he resort to court action for appointment as statutory receiver.

Further evidence in support of our position that the legislature did not contemplate that a receivership be the only manner in which the supervisor could take charge of an association and its assets is revealed when one considers the language of Section 5626 as it appears originally in Laws of Missouri, 1931, page 163:

> "The possession of the supervisor in charge of the affairs and assets of such association shall be construed as the possession of the state of Missouri and that the property is in custodia legis * * *."

The underscored portion of Section 5626, supra, was omitted when said section was amended in 1939.

Ballentine's Law Dictionary defines the term "custodia legis" as follows:

> "The custody of the law. When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise. See Gilman v. Williams, 7 Wis. 329, 334, 76 Am. Dec. 219."

There is a well defined rule of statutory construction that in construing statutes the cardinal rule is to arrive at the legislative intent. State ex rel. Wabash Ry. Co. v. Shain, 341 Mo. 19, 106 S. W. (2d) 898. And there is a further rule that to ascertain the true meaning of the language of a statute the court must look at the whole purpose of the act as it was before the enactment and the change in law intended to be made. Betz v. Columbia Telephone Co., 224 Mo. App. 1004, 24 S. W. (2d) 224, 228.

As the section originally read, it contemplated the taking of property by virtue of legal process, and being held in "custodia legis" or in the custody of the law. It is evident that the legislature deemed it desirable that the supervisor be able to take charge of an association and its assets and manage and conduct its business without re-

sort to legal process if in his discretion the best interests of the public would be served.

The constitutionality of a statute is presumed unless the contrary is shown (City of Springfield vs. Smith, 322 Mo. 1129, 19 S. W. (2d) 1), and therefore it is not our purpose to raise the constitutionality of Section 5626, supra. However, statutes conferring quasi judicial powers on executive or ministerial officers have been upheld as valid.

In the case of Shaw v. Lone Star Building & Loan Ass'n., 71 S. W. (2d) (Tex.) 863, a statute authorizing the banking commissioner without court action to annul the certificate of authority of a building and loan association for failure to comply was held not violative of the Texas Constitution providing that no citizen shall be deprived of property except by due course of law and the provision vesting judicial power of the state in its courts.

The above court in discussing the validity of vesting quasi judicial authority in an executive or ministerial officer declares that (l. c. 865):

> "In this connection when an executive or administrative officer is required to perform certain acts when certain facts exist, he must of necessity ascertain and pass on the facts before he can know how or when to govern his acts. This is sometimes called a quasi judicial function. There is a marked distinction between an act that is quasi judicial and one that is classed strictly as judicial. The vesting of quasi judicial authority in an executive or ministerial officer does not violate the judicial provisions of our Constitution. 34 C. J., p. 1180 et seq., and notes. If this were not so, the government could hardly function. All executive and administrative officers are enjoined or required to perform cer-

> tain duties under certain circumstances and conditions. They cannot know when or how to perform until they have ascertained the facts."

And, further, the court in its opinion said (l. c. 866):

> "In Sanders State Bank v. Hawkins et al., 142 S. W. 84 (writ refused), the Court of Civil Appeals had before it for construction section 40, c. 10, p. 503, Acts 29th Legislature 1905 (1st Called Sess.). That act provided:
>
> "'If from an examination made by the superintendent or by one of his examiners, it shall be discovered that any bank or trust company organized under this act is insolvent, or that its continuance in business will seriously jeopardize the safety of its depositors or other creditors, and if the action is taken from an examination by an examiner, such examiner shall recommend the closing of the bank, then it shall be the duty of the superintendent, if he approves such recommendation, by himself or one of his examiners, immediately to close said bank or trust company, and take charge of all the property and effects thereof,' etc.
>
> "The commissioner acted under the above statute, closed the above bank, and took charge of its properties and effects. The opinion clearly upholds the law as valid."

From the foregoing, we are of the opinion that under Section 5626, Laws of Missouri, 1939, page 266, the supervisor of building and loan associations may, without resorting to legal process, take charge of an association and its assets and manage and conduct its business.

We are further of the opinion that by virtue of said section the supervisor may proceed and continue to collect dues and interest, bring and defend suits, authorize and direct foreclosures, pay operating expenses, pay debts to general creditors, employ such help as he needs, attempt to reorganize the organization, bring about merger with other building and loan associations, and seek assistance of other associations, banks, etc., keeping in view the resumption of business by said association.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:HR

MOTOR VEHICLES: Lessee or renter of automobiles for a period of ten days successively is considered the owner of a motor vehicle and must register the same.

February 9, 1940

2-14

FILED
58

Messrs. McCune, Caldwell & Downing
Attorneys at Law
2000 Fidelity Building
Kansas City, Missouri

Attention - Mr. Stanley Garrity

Dear Sir:

We are in receipt of your request for an opinion, under date of February 1, 1940, which reads as follows:

"Mr. Moriarity, Deputy Vehicle Commissioner at Kansas City, has suggested that we write your office direct for an opinion on the question presented in this letter.

"We represent Fred Wolferman, Inc., of Kansas City, Missouri, which company recently negotiated a contract with the Columbia Transfer Company for delivery and transportation service, a copy of which contract is herewith enclosed. The question arises as to how the vehicles used in the fulfillment of this contract should be registered. We understand that where motor vehicles are leased to a concern, the practice is to register the same in the name of

the owner as 'fee owner' and also to register the same in the name of the user as 'lessee'. Our attention has been called to Section 7759, R. S. Missouri, wherein the term 'owner' is defined, as the reason for such double registration.

"We do not consider our client a lessee of the vehicles used in connection with this contract for transportation and delivery service. We do not want these vehicles registered in the name of Fred Wolferman, Inc. as 'lessee' for the reason that our client has completely divorced itself from the transportation and delivery end of its business and now pays a certain rate for such delivery service in the same manner that one would employ a transfer company to transport and deliver a specific piece of property. We desire the registration of these vehicles to be in accordance with the facts as disclosed by the contract on account of questions that might arise under the National Labor Relations Act or the Wage and Hour Act.

"As is shown by the contract, Wolfermans have no control over the equipment. The Columbia Transfer Company simply contracts to keep a certain number of vehicles available which are to be used by the transfer company for our delivery and transportation service. The vehicles are operated by the employees of the Columbia Transfer Company. We simply purchase delivery and transportation service. Certainly, we do not have the exclusive use of any particular vehicles

> because the same can be changed around, sold, disposed of and substituted by the transfer company in connection with the delivery and transportation service. We do not use the vehicles. The Columbia Transfer Company uses them in fulfilling our contract for delivery and transportation service. We have protested against the registration of these vehicles in the name of Fred Wolferman, Inc. in any way. Mr. Moriarity asks that he be advised as to how the vehicles should be registered."

Section 7759 R. S. Missouri, 1929, defines the term "owner" as follows:

> "* * * The term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively. * * * * * "

In your request you have attached a copy of the memorandum agreement between Fred Wolferman, Inc., and the Columbia Transfer Company, which includes "Exhibit A". It will be noticed under "Exhibit A", Par. 1, sub-paragraphs (a), (b), (c) and (d) in which it specifically states in each of the sub-paragraphs the following:

> "* * * which are to be used by the transfer company solely and exclusively for Fred Wolferman delivery and transportation services."

"Exhibit A", Par. 3, sub-paragraphs (a), (b), (c) and (d) set out the method of the charge for the use of certain automobiles contained in the contract proper and in "Exhibit A", which is part of the contract. Under this contract the courts would construe that Fred Wolferman has leased or rented for its exclusive use certain automobiles. It will also be noticed that the term for which the contract shall run is four years causing it to come within the definition of owner, as set out in Section 7759, supra.

Section 7761 Laws of Missouri, 1933-34, page 99, reads as follows:

> "(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity;

> (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the commissioner such additional information as he shall require.
>
> (b) Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or set of plates, bearing such number.
>
> (c) Registration fees made payable to the State Treasurer shall be remitted to the Commissioner with the application for registration for that part of the calendar year of 1934, beginning with February 1, 1934, and ending December 31, 1934, at 11/12 of the schedule amounts hereinafter shown, and for the full calendar year of 1935 and each full calendar year thereafter in accordance with the following schedules: * * * * * * "

It will be noticed the above section specifically states that the owner of a motor vehicle or trailer shall make application for registration of certain motor vehicles. It will also be noticed that this section contains the word owner. This section is mandatory, and it was held in the case of State v. Wymore, 119 S. W. (2d) 941, l.c. 944, as follows:

> "Respondent argues that the remedy provided by this statute is an exclusive

> remedy against respondent for misconduct. On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. * * * "

In giving the wording of section 7759, supra, its ordinary meaning there can be no question but what the term "owner" shall include Fred Wolferman, Inc., who has rented for its exclusive use certain automobiles for a period more than ten days successively. Also, Section 7761, Laws of 1933-34, page 99, is a mandatory section and every owner or person declared to be an owner by law shall make application to register any motor vehicle owned by him.

Also, in the case of City of St. Louis v. Pope, 126 S. W. (2d) 1201, l.c. 1211, the court said:

> "In the Senter Commission Company Case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W. 2d 21, this court laid down this rule(page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * * this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.' * * * * ."

In the case of State v. Becker, 233 S. W. 54, l.c. 55, par. 2, the court said:

> " * * * The owner of such vehicle may operate it on his own premises without being subject to the payment of the registration fee imposed by the statute. In such case he will pay the general property tax. The state maintains roads and bridges at great expense and exacts a license fee for the privilege of driving or operating these high-powered vehicles thereon. It is clear, therefore, that the registration fee is not a tax on the vehicle but upon the privilege of operating it on the highways of the state."

Under the above holding, the registration fee is not a tax on the vehicle but upon the privilege of operating it on the highways of the state. Under the facts in your request Fred Wolferman, Inc., is operating the automobiles under the lease from the Columbia Transfer Company. This matter was passed on by an opinion from this office dated October 4, 1938, and rendered to W. W. Graves, Prosecuting Attorney, Jackson County, Missouri. We are enclosing a copy of this opinion.

CONCLUSION

In reading Section 7759, supra, and also Section 7761, supra, there is no question but that

the legislature intended that one who rents or leases a motor vehicle or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively, is the owner as set out in Section 7761, supra. Since the contract shall be effective from and after November 15th, 1939, for a period of four years Fred Wolferman, Inc., is the owner and should make application for registration of the motor vehicles which he has rented or leased.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

BUILDING AND LOAN: Association which is member of Home Loan Bank cannot borrow in excess of ten per cent from an outside source.

February 24, 1940

2-26

FILED
58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

> "The 1939 General Assembly revised Section 5607 of the Missouri Statutes relating to the methods by which a building and loan association may borrow funds. Prior to the revision of Section 5607 no state chartered building and loan association could borrow in excess of, at any one time, an amount equal to 10% of its assets as shown by its last previous semi-annual statement submitted to the Supervisor. In the event of an emergency, however, the Supervisor could permit an association to borrow an amount not to exceed 25% of the associations total assets as shown by its last report to this office.
>
> "After a careful reading of Section 5607, Laws of Missouri, 1939, page 263, I find the methods and extent by which an association may borrow funds has been substantially changed. My question, therefore, is whether or not the Supervisor can authorize a state chartered building and loan association, which is a member of the Federal Home Loan Bank, to bor-

> row in excess of 10% of its capital from a source other than the Federal Home Loan Bank of Des Moines, in the event he deems an emergency exists, and in the further event that the rules and regulations of the Federal Home Loan Bank of Des Moines are such as to be unsatisfactory to the association so desiring to borrow funds?"

Section 5607, Laws of Missouri 1939, page 257, provides as follows:

> "Any such association heretofore or hereafter organized in this state shall have the power, if provided by its by-laws, to borrow, (a) if it is not a member of the Federal Home Loan Bank, not more than an aggregate amount equal to twenty-five per cent, or (b) if it is a member of such Bank, not more than an aggregate amount equal to fifty per cent, of its capital (as hereinafter defined) on date of application or any date not more than thirty days prior thereto and within such amount equal to fifty per cent of its capital, such association may borrow from sources other than such Federal Home Loan Bank an aggregate amount not in excess of ten per cent of its capital; and no note or obligation for money borrowed from any source other than the Federal Home Loan Bank shall be given for a period of more than two years. Any such association shall have the power, if provided by its by-laws (a) to subscribe for and purchase stock of, and obtain and continue membership in, the Federal Home Loan Bank and comply with the provisions of the Act of

> Congress known as the 'Federal Home Loan Bank Act' and assume all the duties and obligations and liabilities and become entitled to all the benefits provided in such Act, and (b) to obtain advances or loans from such Bank for such length of time and upon such terms as may be required or permitted by such Act, and do any and all things necessary or incident thereto,--including the power to secure such loans or advances by the pledge, assignment and transfer of any notes, bonds, obligations, mortgages and deeds of trust, whether given by members or non-members, and by the repledge of the shares of borrowing members pledged to such association as security for the payment of any notes, bonds or obligations so pledged, assigned or transferred to such Bank,--and (c) to invest in the obligations, bonds, debentures or other securities of said Federal Home Loan Bank and of the Federal Savings and Loan Insurance Corporation, and aggregate amount of its funds not in excess of ten per cent of its capital. 'Capital' as used herein means the aggregate of (a) amounts credited as dues and dividends upon the stock, shares or accounts of members and of (b) amounts of any profits undistributed but reserved for the maturity of and apportionable to particular stock, shares or accounts, less payments to members in the maturing, redemption, withdrawal and repurchase thereof."

As stated in your request, Section 5607, prior to its amendment in 1939, provided that in case of an emergency the supervisor could authorize the association

to borrow an amount not in excess of twenty-five per cent of its assets. This provision was omitted from the 1939 amendment.

It is a well established principle of law that building and loan associations can exercise only such powers as are conferred by the legislative body creating them either by express terms or by necessary implication. 12 C. J. S. 456; 9 Am. Jur. 130.

The 1939 law is unambiguous and nowhere provides that an association may borrow up to twenty-five per cent of its assets in case of an emergency. While the earlier law did so provide, still "we must proceed upon the theory that the Legislature intended something by the amendment." Holt v. Rea, 52 S. W. (2d) 877, 330 Mo. 1237. Therefore, the Legislature, in omitting such grant of power from the later statute, must have intended to withhold such right from a building and loan association. 59 C. J. 1097.

CONCLUSION.

It is, therefore, the opinion of this department that since the amendment of Section 5607, by the Laws of Missouri 1939, page 257, a state chartered building and loan association which is a member of the Federal Home Loan Bank cannot borrow in excess of ten per cent of its capital from a source other than the Federal Home Loan Bank.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO'K:DA

BUILDING AND LOAN: Association may not purchase stock in another association.

February 24, 1940

2-16

FILED
58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

> "We have before us a proposition whereby a state chartered insured building and loan association offers to purchase a group of loans from a state chartered non insured association and pay for these loans partly by cash and partly by issuance of its stock. One of the loans involved in this transaction is acceptable to the purchasing association only if the selling association agrees to purchase a $200.00 full paid insured certificate issued by the purchasing association, which certificate is assigned by the selling association as additional security for the loan until the unpaid balance of the loan has been reduced by principal payments of some $300.00.
>
> "My question in this matter is whether or not a building and loan association may invest its funds in shares of stock issued by another building and loan association?"

It is a well settled rule that building and loan associations can exercise only such powers as

are conferred by the legislative body creating them, either by express terms or by necessary implication. 12 C. J. S. 456; 9 Am. Jur. 130.

The courts of Missouri have not passed upon the question of whether a building and loan association may purchase stock in another building and loan association. However, this question has been the subject of litigation in other jurisdictions and it has been uniformly held that such right does not exist. 12 C. J. S., page 420; 9 Am. Jur. 104.

In the case of Standard Savings and Loan Association v. Aldrich, 163 Fed. 216, the court said, l. c. 218:

> "* * * The investment of funds in the shares of a company organized for a like purpose is beyond the scope of the most liberal view of the incidental or implied powers of such companies. The objects of such associations being only to lend the funds contributed by members for the purpose of building and improving homesteads, one such association could not become a member of another, nor could it lend its own funds except to its own members for the purpose indicated. The concession therefore that the Michigan Association could not legally become a member of the Standard Association, and that the latter could not legally lend its money to an association which was not and could not lawfully become a member, has not been inadvertently made. Thompson on Building Associations (2d Ed.) p. 215, section 114; 4 Am. & Eng. Enc. of L. (2d Ed.) p. 1028; Kadish v. Garden City Loan Ass'n, 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256;

North Am. Building & Loan Ass'n v. Sutton, 35 Pa. 463, 78 Am. Dec. 349; Mechanics' Association v. Agency Co., 24 Conn. 159."

In Montrose Perpetual Building Association v. Page, 143 Md. 631, 123 A. 68, the Court of Appeals of Maryland held that a transaction whereby a building and loan association sold mortgages outright to a bank and then purchased stock in said bank was ultra vires and beyond the powers of the association. In view of the above authorities, it will be seen that an association cannot become a stockholder in another association.

CONCLUSION.

It is, therefore, the opinion of this department that a building and loan association cannot become a shareholder or purchase stock in another building and loan association.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO'K:DA

TAXATION: Board of Education may fix tax under levy voted by people.

April 15, 1940

H-7

FILED
58

Mr. Howard D. McEachen, Superintendent
Monett School District
Monett, Missouri

Dear Sir:

We are in receipt of your letter of April 4, 1940, in which you inquire whether the Board of Education of Monett has the right to reduce a tax of forty (40¢) cents on the one hundred ($100.00) dollar valuation, which was voted at a regular election for building purposes, to thirty (30¢) cents on the one hundred ($100.00) dollar valuation.

Section 9214, R. S. Mo. 1929, which was amended in Laws of Missouri, 1939, at page 698, is as follows:

> "The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

This section is applicable to all classes of schools, and the estimate, when forwarded to the county superintendent and transmitted by him to the county clerk, becomes the levy when acted upon by the county court.

The question of the right of the directors of the various school districts in the state has been discussed by our Supreme Court in State ex rel. Thorp v. Phipps, 148 Mo. 31. In that case the voters of the district had voted a levy of one hundred (100¢) cents on the one hundred ($100.00) dollar valuation. In the estimate submitted to the county clerk, the total levy amounted to only ninety-eight (98¢) cents on the one hundred ($100.00) dollar valuation. We find the following in the opinion of the court, l. c. 36:

> "The question which the Constitution required to be submitted to the tax-paying voters of the district, was, whether the rate of taxation for school purposes might be increased to one hundred cents on the $100 and that is the only question the statute required to be submitted to their vote. Sec. 8005
>
> That question was decided in favor of such increase in this instance, and authorized an increase of the rate to ninety-eight cents on the $100, the same being within the limit of the authority granted. With the apportionment of the tax thus authorized the voters had nothing to do. That duty was devolved upon the board. Sec. 8000. And the authority to apportion the same as was done in the estimate in question was in no way affected by the suggestion of a different apportionment in the notice of the election. So that there is nothing in this contention."

In Pope v. Lockhart, 299 Mo. 141, the question arose as to the right of the school board to make an estimate of the funds necessary to sustain the local schools. In commenting on the power of the school board in this respect, Judge Blair, speaking for the court, stated:

> " * * * It is clear that the Legislature committed to the school board the duty to make the estimates for the year, and that the board kept its estimate well within the lawful limits of the levy constitutionally authorized by the voters. The courts are not expressly given authority to revise the estimates of the board, and will not arrogate to themselves such power merely because it may be thought the levy recommended will raise a sum in excess of the needs of the fund for which the levy is made, nor yet because there may be some evidence tending to show an intent to divert the money, after its collection, to another purpose, since this can be dealt with when such attempt at diversion is made. (C. C. C. & St. L. Ry. Co. v. People, 208 Ill. l. c. 11, 12, and cases cited; 1 High on Injunctions (4 Ed.) sec. 544, pp. 517, 518, 519.) The power given the board is 'highly discretionary' and legislative in nature."

The latter case has been recently approved by our Supreme Court in State ex rel. Marlowe v. Lumber Company, 332 Mo. 379, l. c. 391.

It is apparent from these authorities that a discretionary power is vested in the various school boards of the state as to the amount of the tax levy for the ensuing year, and that there is no limitation on such discretion except that the tax imposed must be within the constitutional limit, or such limit as may be voted by the people in accordance with the constitution.

It is our conclusion, therefore, that the Board of Education of Monett has the right to make a reduction in

the levy voted by the people if, in their discretion, a lesser amount is sufficient for school purposes.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

BUILDING AND LOAN: Association must follow reorganization plan even though it is expeditious to ignore same.

April 26, 1940

4-27

FILED
58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "Enclosed is copy of letter received from the United Savings and Loan Association (Merchants Savings and Loan Association) requesting supervisor's approval to modification of the reorganization plan, copy of which is herewith enclosed, approved by the Circuit Court of Jackson County.
>
> "Section IV of the reorganization plan provides, in part, as follows:
>
> "'When from time to time the said Class B Assets which have been converted and have been accepted and have been approved as Class A Assets by the Supervisor and the Corporation reach in total dollar value an amount equal to ten per centum of the aggregate of the Class B participating units originally issued, a reclassification of such approved and accepted assets and a readjustment of stock ownership and of Class B. Certificates shall be made in the following manner; * * * * * * * * * * .'

> "At this writing over two years have elapsed since the reorganization plan became effective and no partial dividend payment has been made. It would take about $7,400.00 to make the 10% distribution, based on the aggregate of the Class B participating units originally issued. The trustees now have approximately $5,400.00 available for such a distribution, desire to so distribute, and do not believe they will be able to accumulate $7,400.00 that would be available for distribution at an early date.
>
> "Your counsel is requested as to whether or not the Supervisor has the authority without going into Court, to modify a specific method of procedure incorporated in the reorganization plan when, in the opinion of the Supervisor, the modification will inure to the benefit of the majority of beneficiaries of the Merchants Class B Assets Account."

As stated in your request, the reorganization plan became effective over two years ago and was, therefore, drawn up under authority of Section 5627, Laws of Missouri 1931, page 141, which provides in part as follows:

> "* * * * The supervisor may submit to the court any general plan of reorganization of such association or merger or consolidation of such association with another association, and the court may submit such plan to the stockholders for approval or disapproval, but no such action of the stockholders shall be binding on the court but be advisory only, and the court may approve or reject such plan of reorganization, merger,

or consolidation. * * * * * * "

While it is true that the 1939 Legislature amended Section 5627, supra, and gave the court much broader powers in the matter of a reorganization plan (Laws of Missouri 1939, page 257), still we look to the statute under which the organization plan was drawn up to determine any question relating to such plan. 12 C. J. S., page 542.

The Supreme Court of Missouri in State ex rel. Wagner v. Farm & Home Savings and Loan Association, 90 S. W. (2d) 93, 338 Mo. 313, said:

> "Building and loan associations are quasi-public financial institutions, and for the protection of them the State of Missouri has by the Act of 1931, provided special inquisitorial, supervisory and regulating laws which are specific, adequate, complete and therefore exclusive. * * * * * * * *
>
> "* * * * we are not dealing with the reorganization of a purely private corporation, but we are considering a quasi-public financial institution. Therefore, the case of In re Doe Run Lead Company, 283 Mo. 646, 223 S. W. 600, and Section 5482, Revised Statutes 1929 (Mo. St. Ann., Section 5482, page 7871) are not in point." (The case and section cited above deal with the reorganization of private corporations.)

It will be seen from a reading of the statute that a court has authority to approve a plan of reorganization of a building and loan association, which plan is binding and one which the association must follow. Nowhere is the right given to ignore or to go contrary to the explicit order of the court in the reorganization plan. We, therefore, believe an association does not have the right to ignore or refuse to follow a reorganization plan which has been approved by a circuit court even though it is economically expeditious to so do.

CONCLUSION.

It is, therefore, the opinion of this department that a building and loan association which is operating under a reorganization plan approved by a circuit court has no authority to ignore or go contrary to the provisions of such plan.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AO'K:DA

BUILDING AND LOAN: Withdrawing shareholders are entitled to dividends.

May 29, 1940 6-6

FILED 58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

> "On September 8, 1933, the Attorney General rendered an opinion which held that shareholders who have filed notice of withdrawal are not entitled to subsequent dividends or earnings. The opinion dealt with shareholders who have installment shares. We would like your opinion as to whether this ruling applies to a shareholder who is the owner of full paid shares."

As stated in your request, this department, on September 8, 1933, in an opinion addressed to Honorable Ira A. McBride, Supervisor of Building and Loan Supervision, held that withdrawing shareholders are not entitled to subsequent dividends or earnings. The writer of the opinion stated that he had "not been able to find any case in other jurisdictions in point on the subject matter stated in your letter. He then proceeded to quote the building and loan statutes applicable to the point involved and concluded that a withdrawing shareholder was not entitled to participate in the dividends for the following reasons: First, when one withdraws, his dues and obligations cease and he puts no more money in the association; second, he becomes preferred over non-withdrawing members as to the funds on hand for payment of withdrawal; third, he would be entitled to share in the profits made during the period required to accumulate a sufficient amount to retire his shares."

A reconsideration of the above opinion leads this department to the conclusion that the holding therein is not the law and should be overruled.

Section 5604, Laws of Missouri 1937, page 191, provides in part as follows:

> "Any shareholder * * * wishing to withdraw * * *, shall, subject to the provisions of the by-laws, and his certificate of stock and the limitations hereinafter mentioned, have power to do so, upon giving one month's written notice of his intention so to do * * * or at such other time as the by-laws may provide. If given before a stated meeting, the time of such notice shall not be deemed to have commenced to run until the first stated meeting thereafter."
>
> "The member so withdrawing, * * *, shall, if his stock be withdrawable according to * * * be entitled to receive the amount actually withdrawable at the time of making application for withdrawal etc."
>
> "Such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder."

Under the above statute the right of withdrawal is a privilege given to shareholders in building and loan associations and may be exercised absolutely until such right is changed by legislative enactment. State ex rel. Wagner v. Farm and Home Savings and Loan Association, 90 S. W. (2d) 93. As was said in 9 Corpus Juris 938, the right of withdrawal is an absolute one and cannot be arbitrarily withheld.

It will be noted that the statute provides that

"such notice of withdrawal shall not, however, make such withdrawing shareholder a creditor of the association, but his status shall be and remain that of a shareholder." It appears to be the intent of the Legislature that the person who has notice of withdrawal shall remain a shareholder and until paid shall be entitled to all benefits and subject to all liabilities of any other shareholder.

Since the rendition of the former opinion the question at issue has been passed on by two courts of other states and both have held that the withdrawing shareholder is entitled to dividends or earnings. In Rocker v. Cardinal Building and Loan Association, 179 Atl. Reporter 667, 13 N. J. Misc. 397, the court considered the reasons that have been assigned in the former opinion as to why a withdrawing shareholder is not entitled to dividends. The court said:

> "* * * This rule, it seems to me, defeats equal participation in assets for it deprives a withdrawing member, unpaid perhaps for a long period, of dividends on his shares representing his proportionate share of earnings, the right to which is an incident of share ownership. The better rule is that membership continues after withdrawal and until payment or, at least, until the association breaches the membership contract by failing to obey the mandate of the statute as to payment of withdrawals. * * * * * * * * * "

In Fredrick v. Mutual Building and Investment Company, 128 Ohio St. 474, 191 N. E. 729, the Supreme Court of Ohio said:

> "* * * * If the company complies promptly with the stockholder's request to terminate his membership and to withdraw his money, there can be no inequity in terminating his right to dividends. But if, in their discretion, the directors refuse to permit a member

> to withdraw from the company, or to have his money, his right to dividends persists as an incident to his continued ownership of stock."

The above rule seems to be more equitable and just than that which cuts off dividends from the withdrawing shareholder. One of the fundamental features of building and loan associations which distinguish them from other corporations is the right of a shareholder to withdraw his money. If through no fault of his own, the association is in such a condition that it cannot pay such shareholder, then why should he be penalized for something which is no fault of his. The association has his money and continues to use it and to receive returns upon it. While those members who continue to pay money into the association are supplying new capital with which the association may earn money with which to pay dividends, still such payments increase the shareholders' interests in the association and makes a larger sum on which he is entitled to dividends. Therefore, it would seem to us most unfair to refuse dividends to a shareholder who files notice of withdrawal when such amount to which he is entitled is not forthcoming.

In view of the above reasons it is the opinion of this department that the opinion of September 8, 1933, should be overruled and no longer considered the opinion of this department.

CONCLUSION.

It is, therefore, the opinion of this department that a shareholder who has filed notice of withdrawal is entitled to be paid dividends upon his shares of stock until his withdrawal request has been honored.

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

AO'K:DA

BUILDING AND LOAN: Association may not take out life insurance on borrower.

7-16

July 13, 1940

FILED
58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion which reads as follows:

> "A building and loan association in Kansas City has inquired of this department whether it may take out insurance upon the life of a borrower of the association. The plan is to insure the life of every person to whom money is loaned. This life insurance will be in the nature of security in addition to the mortgage and note taken by the association. The insurance will be paid for by the insured, but if he does not agree to such an arrangement, then such insurance shall be paid for by the association. We would like your opinion as to the right of the association to take this added security."

The general rule as to power of a building and loan association to take security is given in 12 C. J. S., 466, as follows:

> "A building and loan association has implied power, if express power is not conferred by statute, to take security for its loans, and such security should comply with statutory requirements, if any."

We look, therefore, to the statutes as to the types of security that may be taken. Section 5594, Laws of Missouri 1939, page 255, par. 1, provides in part as follows:

> "The moneys accumulated from payments on account of stock, interest, premium and fines, as aforesaid, or from any other source whatsoever, after due allowance made for necessary and proper expenses, and subject to the provisions hereinafter set forth respecting the withdrawal and cancellation of shares and accumulation of contingent fund, may, at times provided in the by-laws, be offered to such shareholders or shareholder who shall bid the highest premium for the preference or priority of right to have a loan or advance of a sum equal to the ultimate value of one or more of his or their respective shares; and such shareholders so bidding the highest premium as aforesaid shall be entitled to receive a loan or advance of a sum of money equal to the full value of each share held by him, in the method provided for in the by-laws of such association; the said premium bid may be deducted in gross from the amount of the loan, or may be charged and be required to be paid in proportionate amounts or installments at such time during the existence of the shares of stock loaned or advanced upon as may be provided in the by-laws of the association: Provided, that where the stock of an association is issued in series, or at different times, in such manner that all said stock will not mature at the same time, then the borrower shall pay only such proportion of the full premium as the number of months his stock lacks of being one

> hundred and twenty months old, bears to one hundred and twenty months. Said association may provide in its by-laws that the bids for loans at its stated meetings, instead of a premium, shall be a stated rate of annual interest upon the sum desired, payable in periodical installments; such bids shall be the interest to be paid during the whole period of the loan or advance. A shareholder shall be entitled to borrow such fractional part of a share as the by-laws may provide. In case there shall be a balance of money remaining undisposed of at any stated meeting, the directors may, at their discretion, loan the funds so remaining on hand to others than stockholders on the security of prime unincumbered real estate or invest in obligations of the United States or of the state of Missouri and may dispose of such loans and investments at any time the said funds are needed for making loans to members, or for the other purposes of the association: Provided, that any such association may, by action of its board, dispense with the offering of its money for bids, and in lieu thereof loan or advance its money to members at such a rate of interest, or interest and premium, or interest and loan fee, as may be fixed from time to time, such premium as charged to be paid in gross or periodical installments. * * * * * "

Section 5597, Laws of Missouri 1939, page 257 provides in part as follows:

> "For every loan or advance made to a member as aforesaid, a non-negotiable note or bond secured by first mortgage or deed of trust on real estate shall be given, accompanied by a transfer

and pledge of the shares of stock of the member or members so obtaining a loan or advance. Said shares so transferred and pledged shall be held by the corporation as additional or collateral security for the performance of the agreements, covenants and conditions of said note or bond and mortgage or deed of trust. Said note or bond and mortgage or deed of trust shall recite and set forth the number of shares transferred and pledged by the particular shareholders so borrowing, and the amount of money advanced thereon, and shall be expressed to be conditioned for the payment at the stated meetings, or at such other times as may be agreed upon, to the corporation of the dues on the number of shares so pledged and advanced upon, and the interest, or interest and premium upon the loan or advance for which said shares are pledged, and said note or bond and mortgage or deed of trust given, together with all fines chargeable upon arrears of such payment, shall remain in full force and effect until said shares shall reach the ultimate value thereof, and until all payments of dues, interest and fines and all other liens due to such association on account of such shares and loans shall have been fully paid, or said loan shall be otherwise sooner cancelled and discharged: Provided, however, that the shares of the particular corporation without other security, may, in the discretion of the board of directors, be accepted as security for loans or advances, to an amount not exceeding nine-tenths of the withdrawal value of such shares at the time, as shown by the books of such association.
* * * * * * * * * * * "

Therefore, in Missouri as was stated in Tierman's Ex'r v. Security B. & L. Ass'n., 152 Mo. 135, 53 S. W. 1072, "the funds of such corporations shall be loaned only 'on real estate security, or on the security of its own shares of stock' * * " No other type of security is recognized by the Statutes of Missouri and so the taking out of insurance by the association on the life of the borrower is not permissible.

This view is borne out by the case of Smathers v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 72 S. W. (2d) 875, in which the borrower delivered to the building and loan association certain fire insurance policies upon the property which he had mortgaged as added security. The court said:

> "The plaintiff contends that under the law governing building and loan associations such associations are forbidden to loan money on personal property, * * * The loan in question was made on real estate and not on personal property. The pledge of the policies was a mere incident to the main contract. It is a matter of common knowledge that a building and loan association ordinarily requires a borrower constantly to keep the premises securing the loan insured and to pledge the right of the insured in the policy to the payment of the loan. * * * * * * * "

In this opinion we do not pass upon the right of the association to pay for fire insurance upon the premises although this right has been upheld in other jurisdictions. Chicago Building Society v. Crowell, 65 Ill. 453.

CONCLUSION

It is, therefore, the opinion of this department that a building and loan association may not take

out insurance upon the life of a borrower and pay for such insurance out of its assets.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AO'K:DA

ASSESSORS:
BUILDING AND LOAN ASSOCIATIONS:

County assessor has right to inspect list of shareholders in building and loan association.

September 24, 1940

q-n

FILED
58

Hon. J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion upon a question submitted to you in a letter from Mr. Walter H. Miller, Assessor of Jackson County. The letter reads as follows:

"In checking over personal property returns given to the Assessor by individuals within this county, I do not find any record of building and loan stock or shares listed, and on the other hand, in the past when I have assessed building and loan companies a personal tax against the furnishings of buildings they own and operate, I have been told that they are not required to pay a tax on this class of personal property because of the fact the shareholders pay a personal tax on their shares.

"As I have stated above, it has been impossible to receive a listing of building and loan shares from individual taxpayers. The result is that an apartment building which is owned and operated by a building and loan company pays no personal property tax on furnishings. Likewise, an individually owned apartment the same size and with the same furnishings must pay a personal property tax. There have been numerous

> complaints of the fact that an unfair condition exists.
>
> "Attempting to clarify the matter at this assessment time, I addressed a communication to each and every building and loan company or association operating within the boundaries of this county. The communication was dated April 30, 1940, and was sent by registered mail, return receipt requested. As of to date, the only response I have received is a communication from the Kansas City League of Building and Loan Associations dated May 11th, acknowledging receipt of my letter and stating it would be taken under consideration.
>
> "It would seem to me, in view of the fact that the building and loan companies do not pay a personal property tax on any household furnishings that they own within the boundaries of this county, that in fairness they should be willing to furnish a list of their shareholders within the boundaries of this county so that they might be taxed, and if such were the case, it would be ample proof then that the building and loan companies would be justified in not paying a tax themselves."

The question involved in the request is: Has an assessor the authority to require a building and loan association to allow him to examine the list of shareholders?

The taxation of building and loan associations is provided for in Section 9768 R. S. Mo. 1929 (Mo. Stat. Ann. Section 9768, page 7885) and reads as follows:

> "All parties holding stock or shares as owners or in trust in any building and loan association in this state, on which

> no loan has been obtained from such association, shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June in each year, and the tax shall be levied upon said shares, and collected from such holder or depositor of the same, as taxes on other personal property; and any failure on the part of such owner, holder or depositor of such shares shall subject such holder to the same penalties now provided for failure to give to the assessor a true list of all taxable property, verified by affidavit."

In the case of Kansas City v. Building and Loan Assn., 145 Mo. 50, the court construed the above statute as follows:

> "The property of building and loan associations is excepted from assessment and taxation by the state law; that law providing for the assessment and taxation of such corporations by assessing the shareholders on their shares and from them collecting the tax."

The reason for this procedure is, as pointed out in State ex rel. v. Lesser, 237 Mo. 326, "the difficulty in reaching the tangible property in those concerns; the stock is treated as representing the property and taxed in lieu of taxing the property."

Under Section 9756, Laws of Missouri, 1937, page 570, every person owning taxable personal property must make a list for the assessor.

Section 9760, R. S. Mo. 1929 (Mo. Stat. Ann. Section 9760, page 7877) provides as follows:

> "Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

Under the above statute a list must be made by the assessor "to include other taxable personal property not given in by the owner." State v. Gomer, 101 S. W. (2d) 57, 340 Mo. 107. In making up this list the assessor may make any examination or search which may be necessary and may examine any person upon oath in order to obtain the necessary information.

The general rule is stated in 61 C. J. 667 as follows:

> "Under the statutes existing in some states the officer or board charged with the duty of assessing the property * * * for the purpose of taxation may have compulsory process to compel the corporation to disclose the information necessary for the making of an assessment or may examine persons under oath and inspect the books of the corporation for the purpose of obtaining it."

The reason for granting this right of examination to the assessor is "but an aid to the assessor to enable

him to perform the duty enjoined upon him." People v. Mills National Bank, 55 Pac. 685, 123 Cal. 53.

In Youngstown 1st National Bank v. Hughes, 6 Fed. 737 (appeal dismissed 106 U. S. 523; 27 L. Ed. 268), a national bank refused to give a list of its depositors to an assessor who wanted such list so that he could assess for taxation said depositors. The assessor relied upon an Ohio statute which authorized him "to issue compulsory process to require attendance of witnesses and examine them on oath." The court said:

> "Their purpose is to ascertain in a legal way and by legitimate testimony, whether any person had, at the time mentioned, on deposit with complainant any money subject to taxation in said county which had not been returned by the owner thereof for that purpose. Hence the subpoena commanding the production of the complainant's books, in the manner and for the purpose stated, is not an exercise of 'visitorial powers'; and it follows that the witness is not protected by said section from amenability to the probate court, for his contempt in disobeying its mandate."

Similar statutes as to the right of an assessor to inspect the books of a building and loan association have been upheld in Co-op. Building and Loan Assn. v. Daniels, 60 N. E. 146, 156 Ind. 463; State ex rel. Morgan v. Workingmen's Building and Loan Assn., 53 N. E. 168, 152 Ind. 278. See also Wallace v. Hughes Electric Co., 171 N. W. 840, 41 N. D. 418.

In view of the above authorities it appears that the county assessor, under authority of Section 9760, has a right to inspect the list of shareholders of a building and loan association when such shareholders have omitted from their property list the shares in such association.

CONCLUSION.

It is, therefore, the opinion of this department that an assessor may require a building and loan association to permit him to inspect the list of shareholders of such association in order to obtain information so that he may assess omitted personal property.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

A'OK:CP

BUILDING AND LOAN: Only borrower with no shares pledged entitled to cast vote.

September 25, 1940

9-28

FILED
58

Hon. J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "The 1939 Missouri General Assembly revised Section 5597, Missouri Statutes, and said section now reads, in part, as follows:
>
> "'And provided further, that an association shall be permitted to make real estate loans without requiring a borrower to own or pledge shares in connection therewith, on a plan or plans requiring periodical direct reduction of the principal of the loan, and each such borrower from an association shall be constituted a member thereof during the life of the loan, and in the determination of all questions requiring action by the members, shall be permitted, as a borrower, to cast one vote in addition to the number of votes that he may be entitled to cast on account of any shares of stock that he may hold; and it is further provided that the proportion that the number or total amount in dollars of all such loans may bear to the number or total amount in dollars of all loans shall not impair or affect mutuality.'

> "The question arises, does each borrower, having obtained a real estate loan from the association, have a vote by virtue of being a borrower alone or is that vote given only to a borrower who obtains a real estate loan (from the association) when such loan is as described in the statute, a loan 'on a plan or plans requiring periodical direct reduction of the principal of the loan?'
>
> "The question is of considerable importance because a great number of state chartered associations either still make the serial plan loans, described at the beginning of Section 5597, or still have that type of loan on their records.
>
> "I will appreciate the benefit of your opinion on the above question."

Our Supreme Court in passing upon the statutes relating to building and loan associations has held that they "are quasi public financial institutions and for the protection of them the State of Missouri has, by the Act of 1931, provided special inquisitorial supervisory and regulating laws which are specific, adequate and complete, and, therefore, exclusive." State ex rel. Wagner v. Farm and Home Savings and Loan Assn., 90 S. W. (2d) 93.

This statement is in accord with the general rule as stated in 12 C. J. S. 400, which provides:

> "Today these associations are so extensively created and regulated by legislation that they have virtually become creatures of statute which must obey the statutory mandates and make effective

> the public policy of the state evidenced thereby. Where this legislation is specific, adequate, and complete it becomes exclusive on the subject."

We believe the statute is plain in its provision that any person who borrows money from a building and loan association without owning or pledging shares in connection therewith, said loan to be paid by periodical reduction payments, is a member of the association and is entitled to cast one vote. The purpose of this proviso is to allow building and loan associations to make real estate loans without the pledging of shares of stock.

This right has been recognized in other jurisdictions, as in Rummers v. Home Savings and Loan Assn., 182 Wash. 539, 47 Pac. (2d) 845.

We believe, from a reading of the statute that this vote is given only to a person who obtains a real estate loan without pledging shares.

CONCLUSION.

It is, therefore, the opinion of this department, that Section 5597, Laws of Missouri 1939, page 257, entitles only a borrower who has a real estate loan from a building and loan association without a pledge of stock, to cast one vote, in addition to the number of votes he may be entitled to cast on account of any shares of stock that he may hold, and this right does not inure to a borrower who has pledged stock with the association for his real estate loan.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

A'OK:CP

COUNTY CLERKS: Need not account to the county for fifteen cents service charge permitted by Conservation Commission.

January 6, 1940

1-10

FILED
59

Honorable F. Hiram McLaughlin
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of December 27, 1939, wherein you state as follows:

> "Your office rendered to Nat W. Benton, former Prosecutor of Greene County, an opinion under date of January 28, 1938, with reference to the salary of the County Clerk of Greene County, at which time it was held that the Laws of 1933 at page 375, which was re-enacted as Laws of 1937, page 443, Section 1, fixed the salary of the County Clerk of Greene County at $4,000 per year, and provided that said salary should be in lieu of all other salaries, fees, commissions or emoluments of whatever kind under and by reason of the terms of any statutory provisions.
>
> The particular question involved at that time was as to whether the County Clerk of Greene County could retain any part of the fish and game license fees when such licenses were sold at his office. That opinion held that he was required to account to the County for all fish and game fees and all other fees, since he was on straight salary basis.
>
> It now appears that the fish and game enforcement, being under the regulation

of the Conservation Commission, and the Commission reserving the right to appoint agents for the sale of licenses, whether, if the Commission should appoint the County Clerk of Greene County as its distributing agent, he could retain the 15¢ service charge permitted by the Conservation Commission, or would still have to account for such fees to the County.

This may seem an unnecessary request in view of the provisions of the 1937 act, but since under the Wild Life and Forestry Code, the County Clerk is not ipso facto the agent of the Commission by terms of the statute, but may or may not be appointed as such agent by the Conservation Commission, does the provision of 1937 act barring the Clerk from retaining any fees or emoluments "under and by reason of the terms of any statutory provisions" apply to the present situation with equal force and with the same result as it did to the situation which existed prior to the adoption of the conservation amendment, at which time the Clerk had the statutory duty of selling fish and game licenses, whereas now he is under no statutory duty in the premises, but derives his authority entirely from the fact of his appointment as such agent by the Conservation Commission?

Does he still have to account for the 15¢ service charge to the County Treasury, or may he retain this or any part of it for himself?"

The amendment to the Constitution of Missouri creating the Conservation Commission was adopted November 3, 1936, and provides as follows:

"The control, management, restoration, conservation and regulation of the

bird, fish, game, forestry, and all wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the CONSERVATION COMMISSION, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wildlife conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows: one for a term of two years or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses

incurred while actually engaged in the discharge of their official duties.

Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission.

A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employes as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employes and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment.

The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose.

The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all

existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

Pursuant to the above constitutional authority to control, manage, restore, conserve and regulate fish and game, etc., the Commission promulgated the following regulations and laws:

Section 29 provides that the distributing agent, duly authorized by the Commission, may charge and collect a fee of fifteen cents for each permit distributed:

"Permits issued by the Commission to pursue, take, transport, ship, buy, sell, store, serve, use or possess wildlife, and to use any equipment, material or facility for the taking of such wildlife, in accordance with these regulations, may be obtained by residents, non-residents, and aliens, for the purposes and under the conditions as herein set forth, upon payment, to the Commission or its authorized distributing agent, of the permit fees stipulated by these regulations. Any such distributing agent, duly authorized by the Commission, may charge and collect from the permittee for all services relating to the distribution of any such permits, an additional sum not to exceed fifteen cents (15¢) for each permit distributed. No such permits shall be duplicated without the payment of one-half (½) of the initial permit fee herein specified. The Commission reserves the right to deny, revoke, or suspend any permit, or the renewal thereof, and to determine which type of permit may be distributed by any distributing agents; provided, that no permit shall be revoked or suspended until the holder thereof shall have been afforded a

> reasonable opportunity to be heard by an authorized representative of the Commission."

Section 30 designates the clerk of the county court in each county as distributing agent, and reserves the right to designate additional distributing agents.

> "The Conservation Commission hereby designates and appoints the clerk of the county court in each county and the license collector of the City of Saint Louis as distributing agents for such permits as may be stipulated by the Commission, conditioned upon the consent of their respective sureties and the faithful performance of such duties as may be delegated to such agents who shall accept, receipt for, and remit to the state treasurer at the close of each month, all moneys derived from the distribution of such permits, less and except such personal service fees as are herein specifically provided. The Commission reserves the right to designate additional distributing agents and to fix their qualifications and duties. Such agents may charge and collect the service fee of fifteen cents (15¢) and they shall accept, receipt for and remit to the Commission at its office in Jefferson City, at the close of each month all moneys derived from the distribution of such permits."

Under Section 8253, Revised Statutes of Missouri, 1929, the legislature conferred upon the county clerk the official duty of issuing hunting and fishing licenses. Now it is to be noted that the duty is not imposed upon the clerks to issue same by statute, but they are merely designated by the Conservation Commission as "distributing agents." In other words, under the broad powers granted by the people to the Conservation Commission, the latter might have designated any persons they desired to act as distributing agents.

You direct our attention to an opinion rendered by this department under date of January 28, 1938, holding that the county clerk of Greene County is on a salary basis and must account for the fish and game fees to the county treasurer, same being based on the Laws of Missouri, 1933, Section 1, page 375, re-enacted in Laws of Missouri, 1937, Section 1, page 443, which, after declaring the amount of salary to be paid the county clerk, provides that:

> "Said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind, under and by reason of the terms of any statutory provisions outside of this article."

You then observe that:

> "* * the fish and game enforcement, being under the regulation of the Conservation Commission, and the Commission reserving the right to appoint agents for the sale of licenses, whether, if the Commission should appoint the county clerk of Greene County as its distributing agent, he could retain the 15¢ service charge permitted by the Conservation Commission, or would still have to account for such fees to the county."

The concluding sentence, as found in Section 1, Laws of Missouri, 1933 and 1937, supra, declares that the said salaries are in lieu of fees "of whatsoever kind under and by reason of the terms of any statutory provisions." The fees in this case for services would not be earned by virtue of any statutory provisions since the regulations and laws of the Commission are promulgated by virtue of a constitutional amendment.

46 C. J., Section 249, Page 1019, states that:

> "Fees collected by officers represent the charges which the state makes for services rendered by it through its officers, and constitute a fund subject to the control of the state and to be applied as the legislature directs."

The fees collected by county clerks as distributing agents do not represent charges which the state makes for services, and the funds are not subject to the control of the state nor are they to be applied as the legislature directs.

As previously pointed out, there is no official duty upon the part of the county clerks to act as distributing agents, but they are merely designated by the Commission as such. Furthermore, under the constitutional amendment, supra, the funds are not subject to the control of the state but are subject to the control of the Commission. Again, they are not to be applied as the legislature directs, but rather as the Conservation Commission directs.

It might be argued that to permit the county clerks to retain these fees would be to permit an increase in compensation during their term of office, contrary to Article XIV, Section 8 of the Missouri Constitution. In the case of Little River Drainage District v. Lassater, 29 S. W. (2d) 716, l. c. 719, the court, in holding that the above constitutional provision does not prohibit an increase in the county officers' compensation during their terms of office for performing duties incident to their offices, said:

> "Appellant contends that section 4575 authorizes an increase in the compensation of township collectors during their terms of office and hence violates section 8, of article 14, of the Missouri Constitution, which provides that 'the compensation or fees of no State, county or municipal officer shall be increased during his term of office. * * *' As neither county collectors nor township collectors, in respect to their services, in collecting the taxes of drainage districts, perform any of the duties of state, county, or municipal officers, it

> would seem that the fixing of their compensation for rendering such services to drainage districts is not controlled by section 8, art. 14, of the Constitution.
>
> The constitutional inhibition only applies to compensation or fees of officers for preforming duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864; State v. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187, 257 S. W. 453."

It might be further argued that since no duty is imposed upon county clerks to act as distributing agents, they are prohibited from performing such services and retaining the money earned in addition to their salary.

Said argument was advanced in the case of State v. Hinshaw, 198 N. W. 634, l. c. 637, wherein the court said:

> "A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source."

From the foregoing, we are of the opinion that the county clerk of Greene County may retain the fifteen cents

service charge permitted by the Conservation Commission and need not account for such fees to the county.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:VC

INFORMATIONS AND INDICTMENTS: It is necessary for the prosecuting witness to endorse his name on an indictment but not necessary that it be endorsed by him on an information.

February 9, 1940

2-14

FILED
59

Honorable F. Hiram McLaughlin
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We are in receipt of your letter of February 5, 1940, containing a request for an opinion based on a letter enclosed written by the firm of Neale, Newman, Neale and Freeman. Without setting the request out in full, your question is briefly as follows:

The prosecuting witness in a misdemeanor prosecution failed to personally endorse the information. The point was properly raised by the defense in a motion to quash, which was overruled by the court. Your question is whether or not the court erred in failing to quash the information, and whether or not a new trial should be granted for that reason.

Section 3542, R. S. Mo. 1929, provides that any indictment returned for trespass against the person or property of another, or any indictment for libel or slander must bear the name of the prosecutor endorsed thereon. Section 3543, R. S. Mo. 1929, provides that the prosecutor shall endorse his own name on any such indictment. These sections are under Article 7 styled "Grand Juries And Their Proceedings", and cannot, therefore, refer to informations.

The statute bearing immediately on the question is Section 3510, R. S. Mo. 1929, which is as follows:

> "When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such

> affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

A close examination of this section fails to reveal that the prosecuting witness must endorse his own name thereon, and it has the further provision that such prosecuting witness shall be liable for the costs in case the defendant be acquitted or the prosecution fail. It provides that "the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit * * * shall be deemed the prosecutor".

In the case of State of Missouri v. Nettie Flick et al., 167 Mo. App., page 6, several complainants filed affidavits with the prosecuting attorney charging the defendants with keeping a bawdy house. In that case, although the court held the offense was not one under what is now Section 3542, R. S. Mo. 1929, there was no mention that the complainants had endorsed their names on the information, the court apparently interpreting the statute as we have above.

Section 3504, R. S. Mo. 1929, is as follows:

> "Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having

> jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

There is nothing in this section which requires the name of the prosecuting witness to be endorsed by himself on the information. The final sentence requires that witnesses for the prosecution must be endorsed in like manner * * * as required in the case of indictments. This, undoubtedly, refers to Section 3544, R. S. Mo. 1929, which provides that names of all the material witnesses must be endorsed upon the indictment, the wording being the same in both instances except for the use of "information" in one and the word "indictment" in the other.

It is therefore the opinion of this department that, while it is necessary for the prosecuting witness on an indictment to endorse thereon his name in the particular instances set out herein, apparently for the purpose of identifying him as such, it is not necessary for the prosecuting witness under an information to endorse thereon his own name, his identity being fixed by his affidavit or complaint with the prosecuting attorney or magistrate before whom the prosecution is brought or complaint made.

Respectfully submitted,

ROBERT L. MYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
RLH:VC

TAXATION: Husband and wife must make separate return for property owned by entirety and as individually owned.

May 15, 1940

5-16

FILED
59

Mr. S. T. McIntyre
County Assessor
Marion County
Hannibal, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of May 11, 1940, which reads as follows:

> "I wish you would give me an opinion on the following assessment list; i. e. John Doe and his wife, Anna Doe own one or more pieces of real estate together, that is - a joint title; then John Doe himself owns separate real estate, the title just in his name. Or the said John Doe might own personal property such as household furniture, live stock, and especially automobile or truck with title in his name only.
>
> "It is my contention that I would be entitled to make two assessment lists, one for the real estate which is a joint title and one for the personal property known to belong to John Doe personally."

On January 18, 1940, this department rendered an opinion to the Honorable Emory C. Medlin, Prosecuting Attorney of Barry County, in which it held that the county assessor receives payment on one list on each owner of property which contains both personal property and real estate of each person in the county. A copy of this opinion is herein enclosed.

Section 9756, Laws of Missouri, 1937, P. 570, partially reads as follows:

> "The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. * * * "

Under the above section it will be noticed the following appears, "to make a correct statement of all taxable property owned by such person, * * * ." In construing the statutes the word "person" shall also be considered singular and plural. All statutes concerning taxes must be strictly construed. Statutes authorizing collector of taxes must be strictly construed, as was held in the case of State ex rel Western Union v. Markway, 110 S. W. 2d 1118, 341 Mo. 976.

Collection of taxes can only be made in accordance

with tax books as actually made and furnished to collector. State ex rel, and to the use of Parrish v. Young, 38 S. W. 2d 1021, 327 Mo. 909.

Sections 9915 and 9916 R. S. Mo., 1929, provide for the method of collection of personal taxes. If suits are filed for personal taxes they should be filed against the proper parties who are owing the taxes. If the personal property is owned jointly by entirety it would be impossible for the two owners of the property individually and singularly to return an assessment list to the county assessor for his, or her, interests in the jointly owned property. If it were possible to so return an assessment list by stating that they are the owners of the undivided half it would not be the proper procedure for the assessment on account of the fact that owners of property by entirety are not the owners of an undivided one-half interest in the property. Owners of property by entirety are by a fiction of law treated as one person. In the case of Greene v. Spitzer, 123 S. W. 2d 57, par. 2,3, the court said:

> "'An estate by the entireties is created by a conveyance to the husband and wife by a deed in the usual form. It is one estate vested in two individuals who are by a fiction of law treated as <u>one person</u>, each being vested with entire estate. Neither can dispose of it or any part of it without the concurrence of the other, and in case of the death of either the other retains the estate. It differs from a joint tenancy where the survivor succeeds to the whole estate by right of the survivorship; in an estate by entireties the whole estate continues in the survivor. The estate remains the same as it was in the first place, except that there is only one tenant of the whole estate whereas before the death there were two.' Ashbaugh v. Ashbaugh et al., 273 Mo. 353, 201 S. W. 72, loc. cit. 73."

The above case applies to real estate, The same laws apply to personal property, and, in the case of Ambruster v. Ambruster, 31 S. W. 2d 28, par. 6 the court said:

> "That a husband and wife can own a bank account as tenants by the entirety may be conceded, Craig v. Bradley, 153 Mo. App. 586, 134 S. W. 1081; and that they or two or more other persons may hold such an account as joint tenants has been declared by statute as well as the decisions of our courts of last resort. Sections 11779, 11840, Rev. St. Mo. 1919; Mississippi Valley Trust Co. v. Smith, 320 Mo. 989, 9 S. W. (2d) 58 and cases cited. * * * * * *"

Under the holding in the above cases the owners by entirety are considered the same as one person, and where property is jointly owned by husband and wife it would necessarily mean that a separate return be made upon an assessment of property owned by entirety. Also, if either one of them owned either real estate or personal property in their own right a separate return must be made by each of them singularly as well as the return made by them by entirety.

CONCLUSION

In view of the above authorities, it is the opinion of this department that as set out in your request if John Doe and his wife, Anna Doe, owned one or more pieces of real estate or personal property together they should make a joint return as to the real estate and personal

property, and if either John Doe or his wife owned a piece of real estate or personal property in their own right they should make another separate return for the property owned individually.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

WJB:RW

LABOR: Section 13218 R. S. Mo. 1929, applies to retail mercantile establishments.

June 18, 1940

619

FILED
59

Mr. F. Hiram McLaughlin
Prosecuting Attorney
Springfield, Missouri

Dear Sir:

We are in receipt of your letter of June 12th, wherein you state as follows:

> "Will you kindly give us your opinion as to whether or not Section #13218 applys to retail merchantile establishments. We would appreciate this opinion as soon as you can send the same to us."

Section 13218 R. S. Mo. 1929, provides as follows:

> "The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said

> establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments: Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

Under the above section "mercantile establishments" are proper subjects of inspection by the Department of Labor and Industrial Inspection. The question is presented whether same applies "to retail mercantile establishments"?

In the case of Veazey Drug Company v. Bruza 169 Okla. 418, 37 Pac. (2d) 294, l. c. 296, the court defines various terms, which are the subject of our inquiry:

> "Thus from all of the definitions the word 'establishment' means an institution, place, building, or location. Its meaning, of course, may vary and does vary with the use of the word. The word 'mercantile' in its ordinary acceptance means pertaining to the business of merchants, and is concerned with trade or buying and selling of merchandise. People v. Federal Security Co., 255 Ill. 561, 99 N. E. 668; H. H. Kohlsaat & Co. v. O'Connell, 255 Ill. 271, 99 N. E. 689. In Carr v. Riley, 198 Mass. 70, 84 N. E. 426, 428, 'mercantile' is defined thus: 'Of or pertaining to merchants or the traffic carried on by merchants; having to do with trade or commerce, trading, commercial'. Thus while the word 'establishment' may mean almost any kind or character of institution, location, building, or place, yet its meaning is greatly restricted when used following the word 'mercantile.' And the expression 'mercantile establishment' must mean and refer to an institution of mercantile business, or a place, building, or location

where the mercantile business or the buying or selling of merchandise is conducted or engaged in. One mercantile business or establishment may differ from another just as one merchant may differ from another merchant as to the character of business engaged in. So we have retail merchants or retail mercantile establishments upon the one hand, and wholesale merchants or wholesale mercantile establishments on the other hand.

"A mercantile establishment is a place where the buying and selling of articles of merchandise is conducted. Hotchkiss v. District of Columbia, 44 App. D. C. 73.

"The term 'mercantile business' is defined to mean 'the buying and selling of articles of merchandise as an employment' in Graham v. Hendricks, 22 La. Ann. 523.

"The term 'wholesale' or the selling in or by unbroken parcels is distinguished from 'retail' or dividing into smaller quantities and selling direct to consumers in Gorsuth v. Butterfield, 2 Wis. 237, and also in Kentucky Consumers' Oil Co. v. Commonwealth, 192 Ky. 437, 233 S. W. 892, and in Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. (C. C.A.) 227 F. 43."

From the definition of the term "mercantile establishment" it is evident that same is broad enough to include "wholesale" and "retail". If the Legislature had intended to limit the meaning of the term "mercantile establishment" to those places where the buying and selling of articles of merchandise is of unbroken parcels, it would have so stated, and any attempt on our part to give it such a limited meaning would be contrary to the plain meaning of the statute.

In the case of Cummins vs. Kansas City Public Service Company 334 Mo. 672, 66 S. W. (2d) 920, l. c. 931, the Supreme Court said:

"It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction."

From the foregoing we are of the opinion that Section 13218 R. S. Mo. 1929, applies to retail mercantile establishments.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

MW/mc

OFFICERS: Census increase may cause increase in salary of public official without violating Section 8, Article XIV, Missouri Constitution.

July 11, 1940

7-12

FILED
59

Honorable F. Hiram McLaughlin
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated July 2, 1940, as follows:

> "It is apparent that the 1940 census will change the salaries of several Greene County officials. Most of these officials are now paid salaries under the provisions of page 442, Laws of 1937, applying to counties with population from seventy-five thousand to ninety thousand.
>
> The preliminary census figures already announced show a greater population than ninety thousand. There are just two points connected with this matter that have caused me to ask your office for an opinion. First, I would like to know your view as to when the 1940 census becomes official. My understanding is that the final figures have not yet been announced, but will be announced from Washington sometime in the future, and I believe that is the date that the new census becomes operative.
>
> Second, Article 14, Section 8 of the Constitution of Missouri provides that the compensation of no county officer shall be increased during his term of office. I should like your view as to whether this section means that officers

cannot receive increased compensation where the census shows that the county has passed from one salary bracket to another during the term, or whether it means that the legislature is prohibited from passing an act increasing the salary. The case of Folk vs City of St. Louis, 250 Missouri, 116, takes the view that the object of this section is to prevent officers using their official influence to obtain an increase of compensation. I am inclined to the view that this constitutional provision has no application where a county passes out of one population group into another group, without any action on the part of the official involved.

Some Greene County officers will lose some compensation, and others will gain by reason of the new census figures. It is my feeling that the new salary basis will go into effect automatically as soon as the new figures are announced, provided the population is greater than ninety thousand.

I would appreciate your opinion in these two matters."

Your first question concerning the effective date of the 1940 decennial census was answered by this office in an opinion to Miss Evelyn Barclay, Circuit Clerk of Adair County, under date of June 13, 1940. A copy of that opinion is enclosed herewith.

Your second question concerning the conflict of an increase in salary because of a change in the population with Section 8, Article XIV of the Missouri Constitution has arisen on several occasions in this state. Section 8, Article XIV of the Constitution of Missouri is as follows:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In State ex rel. Moss v. Hamilton, 303 Mo. 302, which was a suit arising because of an increase in the population of Crawford County, Missouri, during the term of a circuit clerk, we find the following in the opinion of the court, l. c. 314:

> "Were our circuit clerks elected in Presidential years, there would not be before us the peculiar and rather difficult question we have in the instant case. This Act of 1915 was in effect when relator was elected. Under it relator's salary was fixed for his whole term, but not in named dollars and cents for the whole term. The effect of this Act of 1915, was to say to relator, Your salary shall be determined upon the Presidential vote of 1916, until there is another Presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the Presidential vote. The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a deceased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So too if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher but it was definitely fixed at the date

> of his election. If the Act of 1915 had said that the Circuit Clerk of Crawford County elected in 1916 shall receive $1600 per year for the first two years, and $1950 per year for the last two years of the term, there would be no question. Sec. 8 of Article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the Act of 1915 as it now stands is no nearer a violation of Section 8 of Article 14 of the Constitution, than the supposed law. The lawmakers knew the Presidential elections years, and with this knowledge classified the counties as to salaries, and provided that such salaries should be determined by the last previous Presidential vote. The salary of each class was fixed, and, as said, no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed, too, at a time long prior to relator's election. In our judgment Section 8 of Article 14 of the Constitution does not preclude a recovery by relator. This because his salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note. * * * "

Again, in State ex rel. Harvey v. Linville, 318 Mo. 698, a similar question arose in regard to the salary of the county superintendent of public schools in Benton County, Missouri. The court held that an increase in salary because of a change in population did not violate the above section of the Constitution in the following language, l. c. 701:

> "I. The increase of salary which a statute permits after an election showing an increase of population is not in violation of the Constitution in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population. (State ex rel. v. Hamilton, 260 S. W. 466.) The salary of an officer, dependent upon the population as ascertained from time to time, would be determined by the law in force at the time of his election, and a law which went into effect later would not affect the matter. Therefore, if the Act of 1919 was not in effect when relator was elected, it would not apply to his salary at any period of his term."

In view of these decisions, it is the conclusion of this department that an increase in the salary of a county official because of an increase in the population, if disclosed by the 1940 decennial census, does not conflict with Section 8, Article XIV of the Missouri Constitution where the legislation fixing the change in salary was in effect at the time such official took office.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

TAXATION AND REVENUE: In the assessment of lands for general county and state taxes and all subsequent proceedings to foreclose the lien therefor, the description of such lands and lots must be sufficiently definite to lead to identification.

December 21, 1940

1-27

Honorable Syl. T. McIntyre
County Assessor
Marion County
Hannibal, Missouri

FILED
59

Dear Sir:

We desire to acknowledge your request for an opinion on December 17, 1940, which is as follows:

"The question came up sometime ago in regard to advertising property for sale under the Jones-Munger Law. I of course have many subdivisions in this County the same as in all other counties, and I take the position that after a piece of property is subdivided and dedicated as a certain name that is all that should be necessary. However, I would like an opinion as to how property should be described.

"For instance: We have Peyton SD which is a subdivision of W 16 ft lot 4 and lots 5,6,7,8,9,10,11 & 12 of Tingle SD of Outlot 16. We also have a subdivision known as Peyton & Stephens SD of Outlots 12 & 13 of the City of Hannibal. Raible SD of Outlot 3 of Griffith's Extended Addition. Susan A. Richmond SD of S pt Lot 3 in Richmond's Original SD of E½ of SE ¼ of Sec 30 Twp 57 Range 4 West.

> "Will you please give an opinion as to whether all of the above description should be listed on each and every lot or would it be all right to say 'all lot 1' or two whatever the case may be in Susan A. Richmond SD or whatever Subdivision it might happen to be.
>
> "I have looked for some decisions along this line but up till now have been unable to find any."

Lands in this state are generally described by sections, townships and ranges or subdivisions thereof. When a municipality is carved out of such area it is usually divided into lots, blocks and additions or unplatted described tracts. However, in some sections of the state, in addition to such division, there exists an additional area division called outlot.

In the assessment of lands and lots for taxes the descriptions must be sufficiently definite to lead to identification; otherwise the assessment and all subsequent proceedings are void.

In the case of Sligo Furnace vs. Kieffer, 229 S. W. 188, the court held that, in a tax foreclosure, the prima facie showing of correctly recited description in the judgment and deed was overcome by the order of publication, which did not describe the property with sufficient certainty to give jurisdiction.

In the case of Talley v. Schlatitz, 180 Mo. 231, 79 S. W. 162, the court held that, a sheriff under an execution in a suit for taxes could not make a good deed to the land if it were wrongly described in the notice of sale. In the case of Milner v. Shipley, 94 Mo. 106, 7 S. W. 175 the court held:

> "It is said the court erred in allowing the judgment to be impeached by the files of the court. The judgment recites that the defendants had been 'duly notified by

> publication,' etc. This recital is doubtless conclusive, in a collateral proceeding like this, that the order made by the clerk in vacation had been duly published according to the command of the order. But the petition and order of publication are as much a part of the record proper-the judgment roll-as the judgment itself. If there is any conflict between the recitals in the judgment, as to the terms of the order, and the order itself, the latter must control, for a recital of the order must yield to the order itself. Crow v. Meyersieck, 88 Mo. 411. A judgment which is erroneous, or irregular, or both, cannot be impeached collaterally. Rosenheim v. Hartsock, 90 Mo. 365; Burnett v. McCluey, 92 Mo. 230. But here the court had no jurisdiction to render a judgment against property, different from that described in the petition and order of publication. The judgment is, therefore, void, and open to collateral attacks. Janney v. Spedden, 38 Mo. 397."

In the case of Ware vs. Johnson, 55 Mo. 500, the court held that where a sheriff's deed, in a sale of lands contains a false subscription, a court of equity will not aid the deed and pass the title. That the only redemption in such case is a proceeding to obtain a new deed in the court from whence the process issued.

In the case of Lowe vs. Ekey, 82 Mo. 286, the court held that, a description of the land in a tax deed must conform to the anterior proceedings; "The tax must follow the assessment, judgment and execution. See Bladwell on Tax Title (3d Ed.) side p. 384, top p. 379. The assessment and all the subsequent tax proceedings under which the tax deed purports to be executed contained no adequate description of the lands, and were therefore void. There was no valid judgment rendered against the land for the taxes of 1874."

The rule as to the determination of whether a description of real estate is sufficiently definite or not, is laid down in the case of National Cemetery Ass'n. of Missouri vs. Benson, 129 S. W. (2d) 842, 845 in the following language:

> "The assessments are not void because the description '65 acres unplatted portion of Valhalla Cemetery' in Normandy School District is insufficient. In some assessments the word 'unplanted' was inadvertently substituted for 'unplatted.' We have followed the general rule in this State that a description is sufficiently definite and certain if the description by its own terms will enable one reasonably skilled in such matters to locate the land. Elsberry Drainage District v. Seerley, 329 Mo. 1237, 49 S. W. 2d 162. A valid assessment is essential to a valid tax. In State ex rel. Wyatt v. Wabash Railway Company, 114 Mo. 1, 21 S. W. 26, we quoted from City of Philadelphia v. Miller, 49 Pa. 440: 'Where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is taxed, the duty of payment cannot be performed, and the assessment is void.' Mr. Robert Kinsey, a surveyor, who was called as a witness by plaintiff testified that from the beginning he did all the surveying work for the cemetery. He stated that there was 67,238 acres of unplatted land and upon deducting 2 acres for variations and roadways, there remained 65,238 acres of unplatted land in April, 1925 and the subsequent years for which the assessments were made. We hold that the description was sufficient, * * *"

In the case of State vs. Childress, 134 S. W. (2nd) 136, a suit was brought by the State of Missouri at the relation and to the use of Harry Martin, Collector of Douglas County against R. W. Childress to enjoin him from moving a house from land upon which taxes were due and unpaid.

The land described on the assessor's books and on the collector's books is as a "part of NW¼ NW¼, Sec. 23, Twp. 27, Rg. 17."

The court in discussing the question of description, held as follows:

> "Are the facts sufficient to support the judgment? There was, what we may term, a typographical error in the petition, otherwise the description therein, in effect, conformed to the description in the deed record introduced in evidence. Respondent, it would seem proceeded at the trial on the theory that the state had a lien for taxes on the land, regardless of the description on the assessor's books, or on the collector's books, or in the notice of sale, and that if the land was correctly described in the petition and then it was shown by oral evidence that such land was, in fact, the land owned by defendant, that such was sufficient and would cure any defect in description on the tax books or in the notice of sale.
>
> "The state's lien for taxes 'does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax.' McAnally v. Little River Drainage District, 325 Mo. 348, 28 S. W. 2d 630, 631, Sec. 9747, R. S. 1929, Mo. St. Ann. Sec. 9747, p. 7868.

> "State ex rel. Flentge v. Burrough, et al., 174 Mo. 700, 74 S. W. 610, was an action 'for back taxes.' The tax bill described the land as 'pt. out lot 54, survey 2199.' It was held that such description would not support a judgment for taxes, and that a correct description in the petition would not validate or cure such description. See also State ex rel. Wyatt v. Wabash R. Co. et al., 114 Mo. 1, 21 S. W. 26; State ex rel. Ward v. Linney, 192 Mo. 49, 90 S. W. 844; State ex rel. Smith v. Williams et al., Mo. Sup., 216 S. W. 535; State ex rel. and to Use of Ross v. Lamb, Mo. Sup., 26 S. W. 2d 83."

A lot or part thereof is the smallest unit of any area within a municipality. To give a description sufficiently definite to identify such lot it is necessary that it be shown to be within a designated block, addition or out lot - where such subdivision exists.

Applying the above rules of law to your problem and example mentioned in your inquiry "Lot 1, Block 1 in Susan A. Richmond subdivision to the City of Hannibal," let us presume that there was a Susan A. Richmond subdivision in out lot 1, and another in out lot 2, or perhaps two such subdivisions in the same out lot. Such description would not meet the requirement of the above rules of law.

CONCLUSION.

Therefore, it is the opinion of this Department that in the assessment of lands and lots for general county and state taxes and all subsequent proceedings necessary in the foreclosure of

the lien therefor, the description of a lot or group of lots must be sufficiently definite and certain that by its own terms it may enable one reasonably skilled in such matters to locate the land or lots.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

SVM:RV

TOWNSHIP ORGANIZATION:)
ROADS, HIGHWAYS & BRIDGES:)

Commissioners of Special Road Districts - how selected under Section 8063, R. S. Mo. 1929

January 8, 1940

1-10

FILED
60

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This Department is in receipt of your letter of January 4th in which you request an opinion. Your letter reads as follows:

> "The County Court has requested me to get an opinion from you in regard to Section 8063, Special Road Commission, in regard to electing Commissioners for a Special Road District.
>
> "What they want to know is who has the authority to appoint the men who count the votes, whether they should appoint the judges or whether the Commissioners have that authority."

In School District v. Day, 43 S. W. (2d) 428, l. c. 432, the court in construing the statute said:

> "It is a companion section to section * * * both being a part of the same act * * * and they should be construed together."

Your question goes to Section 8063, R. S. Mo. 1929, which section is as follows, to-wit:

"At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the voters of the district, at an hour and place to be filed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. No person shall be elected or appointed commissioner who is not a resident of the district and an owner of land in the district. Any vacancy caused by resignation, death, removal from the district of a commissioner or sale of all land owned by him in the district shall be filled for the unexpired term by election by the voters of the district. All commissioners shall qualify by taking, subscribing and filing with the county clerk the oath prescribed by the Constitution of this state, and that they will faithfully, honestly and impartially discharge their duties as commissioners according to law. If for any reason the board of commissioners hereinbefore mentioned shall fail to call an annual or other prescribed election to fill a vacancy or vacancies caused by the expiration of the term

> "of any one or more of the commissioners, then the county court is hereby authorized and required to call an election to fill said vacancy and to fix the time therefor within fifteen days after making the order for such election."

It will be observed from a study of the legislative history of this section that there was a similar section in the statutes, as will be found in the Laws of Missouri, 1913, at page 679. And upon further examination it will be found that in the year 1919, as is shown by Laws of Missouri, 1919, at page 732, the Legislature reenacted the section,which follows nearly verbatim the section as set forth in Laws of Missouri, 1913, and said section makes this change after the words, "be filled for the unexpired term," viz., "by appointment by the remaining commissioners of the district."

On further study, it will be found that Section 10835, Revised Statutes of 1919, as well as Section 863 of the Revised Statutes of 1929, attempt to follow the Laws of 1913. Whereas, the law as it stands today, in the opinion of this Department, is Section 4, Laws of Missouri, 1919, at page 732, and for the purposes of this opinion said section is used and is set out as follows, to show the difference between it and Section 8063, as it appears in the Revised Statutes of Missouri, 1929, heretofore set out in this opinion:

> "At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the voters of the district, at an hour and place to be fixed by said commissioners, shall elect three commissioners one of whom shall serve one year, one for

two years, and one for three years and on the first Tuesday after the first Monday in January and each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. No person shall be elected or appointed commissioner who is not a resident of the district and an owner of land in the district. Any vacancy caused by resignation, death, removal from the district of a commissioner or sale of all land owned by him in the district shall be filled for the unexpired term by appointment by the remaining commissioners of the district. All commissioners shall qualify by taking, subscribing and filing with the county clerk the oath prescribed by the Constitution of this state, and that they will faithfully, honestly and impartially discharge their duties as commissioners according to law. If for any reason the board of commissioners hereinbefore mentioned shall fail to call an annual election to fill a vacancy or vacancies caused by the expiration of the term of any one or more of the commissioners, then the county court is hereby authorized and required to call an election to fill said vacancy and fix the time therefor within fifteen days after making the order for such election."

From observation of the statute it will be found that Section 8061, R. S. Mo. 1929, specifies that county courts may form road districts in certain instances, and Section 8063, supra (which in our opinion should read as Section 4, Laws of Mo. 1919, set out above), tells how the commissioners may be selected. And it will be observed that, as the statute reads, "at the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the

district, who shall hold their office until the first Tuesday after the first Monday in January thereafter," these commissioners are, in the inception of the organization, first appointed by the county court.

And the statute further states, "and on said date the voters of the district, at an hour and place to be fixed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter * * * * * * * *." In other words, the acting commissioners are to call these elections, and indicate the time and place of their holding, and it is clearly implied that the manner of taking, as well as of ascertaining and recording the result of the vote, is left to that body. See, State ex inf. v. Heffernan, 243 Mo. 442, l. c. 452. In the inception of the organization of the district, the voters would select three persons, one for one year, one for two years, and one for three years, and at each annual election thereafter they would select one for a period of three years.

And following further, the statute reads, "they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. No person shall be elected or appointed commissioner who is not a resident of the district and an owner of land in the district." By the word "they," it is the opinion of this office that the Legislature had reference to "voters."

And further, the statute says, "any vacancy caused by resignation, death, removal from the district of a commissioner or sale of all land owned by him in the district shall be filled for the unexpired term by appointment by the remaining commissioners of the district." This, we think, is clear, and means that the office of said commissioner shall be filled by the remaining commissioners of the district. All commissioners shall qualify by taking, subscribing and filing with the county clerk the oath prescribed by the Constitution of this state, * * *."

It will be found that if the commissioners do not carry out the duties imposed upon them, that is, calling the annual election or a special election, as the circumstances require, prescribing the time, etc., as explained

in the foregoing part of Section 8063, the statute provides thus:

> "If for any reason the board of commissioners hereinbefore mentioned shall fail to call an annual election to fill a vacancy or vacancies caused by the expiration of the term of any one or more of the commissioners, then the county court is hereby authorized and required to call an election to fill said vacancy and to fix the time therefor within fifteen days after making the order for such election."

It is the opinion of this Department that, under this last paragraph of the statute, should the duly elected and qualified and acting commissioners fail to call an annual election, or should fail to appoint a commissioner within a reasonable time, when some member has become disqualified as set forth in the section, then the county court shall have the authority to call said election, and should they exercise this statutory duty, they (the county court) would call these elections, indicate the time and place of their holding, and the implication is clear that the manner of taking, as well as of ascertaining and recording the result of the vote, would be left to that body. See, State ex inf. v. Heffernan, supra.

Conclusion

We are, therefore, of the opinion that where the election is conducted by the commissioners, they are to call the election, indicate the time and place of its holding, and are to prescribe the manner of taking, as well as ascertaining and recording the result of the vote; and if the occasion arose where the county court conducted the election, then it would have the same rights and duties to perform. State ex inf. v. Heffernan, supra.

Respectfully submitted,

APPROVED:

BREVATOR R. CREECH
Assistant Attorney-General

W. J. BURKE
(Acting) Attorney-General

TAXATION: The County Assessor receives payment on one list which contains both personal property and real estate of each person in the county.

January 18, 1940

1-30

FILED
60

Hon. Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 16, 1940, which reads as follows:

> "My County court and the County Clerk have requested an opinion from you in regard to the County Assessor, whether or not in assessing property, real estate and personal property, should be made on one assessment list. Or whether they should be on separate lists and the Assessor collect fees for two lists."

Section 9769 R. S. Missouri, 1929, provides that the Clerk of the county court shall deliver to the Assessor every two years the assessor's book of his last assessment of real estate, as furnished by the registrar of lands.

Section 9778 R. S. Missouri, 1929, provides that after the assessor has made an examination and comparison of the list of property delivered by individuals, and the list of lands furnished by the Secretary of State he shall make a complete list of the taxable

property to be called the assessor's book.

Section 9779 R. S. Missouri, 1929, provides that the real estate shall be assessed each year.

Barry County has a population of 22,803 according to the last decennial census, and the County Assessor of that county should be paid, for making up the personal and real estate list, in accordance with Section 9806, Laws of 1931, page 359, which partially reads as follows:

> "The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, * * * ."

Section 9756, Laws of Missouri, 1937, page 570, partially reads as follows:

> "The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and

> the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain; first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1937, and every year thereafter, anything in this or any other section to the contrary notwithstanding; second, a list of all the live stock, showing the number of horses, mares, and geldings, and their value; the number of asses and jennets, and their value; and the number of mules and their value; the number of neat cattle, and their value; the number of sheep, and their value; the number of hogs and their value and all other live stock and its value; * * * * * * ."

Under the above partial section it will be noticed that the county clerk shall furnish the necessary books and blanks to the assessor, or his deputies, to take a list of all taxable personal property and real estate in his county. It also provides the manner of making assessment. First, it provides that he shall call at the office, place of doing business or residence of each person required by this chapter to list property. The only property that is required to be listed by the owner is personal property, and under the above section he shall list the personal property and the written blank presented for that purpose must be sworn to. According to Sections 9769, 9778, 9779, supra, the assessor makes the return of the real estate. In Section 9756 in setting out the procedure of the assessor to make the list, it is provided first that he make a list of all the real estate and its value to be assessed and listed on the first day of June of each year. The section further

sets out, second, a list of certain live stock. This list as to real estate, live stock and other personal property, set out in order, from live stock to all other property, which consists of eleven different kinds of property shall be placed upon one list to be returned to the county clerk. At the end of Section 9756, supra, is the following phrase:

> "The word 'list' as used in Section 9806 of this Chapter shall include all the lists required under this section to be taken."

It will be noticed that under section 9806, supra, in counties having a population of not more than forty thousand, the assessor shall receive thirty-five cents per list. It can clearly be shown that section 9756, supra, by stating that the list set out in section 9806, supra, shall include all the lists required under section 9756, supra, that it was the intention of the legislature that the list under section 9806, supra, is the only list that the assessor shall receive pay for and that that list includes all of the information obtained in the eleven lists, as set out in section 9756.

In construing a section the principal rule of construction is to follow the intention and purpose of the legislature in enacting any statute. It was so held in Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, par. 7-10, where the court said:

> "* * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is

properly given consideration. See Grier and Meyering Cases; 2 Lewis, Sutherland on Stat. Const. (2d Ed.) sec. 363; Endlich on Interpretation of Statutes, sec. 329; and Maxwell on Statutes (5th Ed.) 425."

Also, it was so held in the case of Wallace v. Woods, 102 S. W. (2d) 91, par. 9-11, where the court said:

"'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration. * * * 2 Lewis, Sutherland on Stat. Const. (2d Ed.) sec. 363; Endlich on Interpretation of Statutes, sec. 329; and Maxwell on Statutes (5th Ed.) 425.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920, loc. cit. 925. * * "

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county assessor of Barry County can only collect thirty-five cents per list on each list which should contain the real estate and personal property.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

CRIMINAL LAW: State is liable for costs on a plea of guilty in a felony case, even if the defendant is paroled from the bench.

January 19, 1940

1-20

FILED
60

Hon. Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 17, 1940, which reads as follows:

> "I would appreciate an opinion for myself, the circuit clerk, and sheriff.
>
> "If the defendant pleads guilty in circuit court, and the circuit judge accepts his plea and then gives him what's known as a suspended sentence will the costs be allowed and paid then or will the State refuse to pay the costs as long as the suspended sentence is pending?"

Section 3809, R. S. Missouri, 1929, was amended in the Session Laws of 1939, and designated as Section 3809, at page 356, which reads as follows:

> "The circuit and criminal courts of this state, the court of criminal correction of the city of St. Louis and boards of parole created to serve any such court or courts shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

I am assuming from your request, in which you refer to the payment of costs by the state, that the suspended sentence was given on a felony for which the state was liable for the costs.

Section 3811 R. S. Missouri, 1929, reads as follows:

> "When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

Section 3812 R. S. Missouri, 1929, provides that the circuit judge who grants a parole may terminate the same without notice.

Section 3813 R. S. Missouri, 1929, provides that the person paroled under the provisions of Section 3811, supra, must make a bond with proper sureties, conditioned for his appearance in court on the first day of each regular term of court during a continuance of such parole.

Under section 3815, R. S. Missouri, 1929, it is the duty of the person paroled to appear each r egular term and furnish proof that he has complied with all the conditions of such parole. The conditions of the parole may extend for as long a period as ten years, and it was so held in the case of Ex Parte Mounce, 269 S. W. 383, l.c. 387, where the court said:

> "As we understand the petitioner's contention, it is that, when a person has been sentenced to serve a term of imprisonment in the penitentiary for two years, which happens to be the minimum within which a paroled person may be discharged, such person is rightfully entitled to be discharged at the end of such 2-year period, plus one term of court thereafter (unless such parole has sooner been terminated), regardless of whether or not reformation be deemed complete, and notwithstanding the fact that discharge, after 2 years have elapsed, is left to the discretion of the court by section 4162. Such contention is unsound, and comes squarely in conflict with the whole plan and purpose of our judicial parole act.
>
> "The broad language of section 4163 is that:
>
> "'No person paroled under the provisions of section 4159 (4157) of this article shall be granted an absolute discharge at an earlier period than two years from date of his parole.' (The section referred to clearly was intended to be section 4157.)
>
> "This language, and that quoted from section 4162, clearly indicate that the parole may be continued longer than two years, and for any period up to ten years, within the discretion of the court."

Section 3817 R. S. Missouri, 1929, partially reads as follows:

> "No person paroled under the provisions of section 3813 of this article shall be granted an absolute discharge at an earlier period than two years from date of his parole, nor shall such parole continue for a longer period than ten years: * "

Section 3818 R. S. Missouri, 1929, reads as follows:

> "It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for non-payment of fine or costs. Such payment of cost by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury, as the case may require."

Under the above section, if the state should pay the costs in any felony case, for which it is liable, and later the costs can be collected from the defendant, or defendants, and the costs are collected before granting a discharge, then the costs shall be turned into the state treasury. From the above section it is shown that it is the intention of the legislature that the state

shall pay the costs in cases in which it is liable, even before the final discharge of the defendant under the suspended sentence.

Claims against the state must be presented within two years from the time that they accrue. This law is set out in Section 11416 R. S. Missouri, 1929, which reads as follows:

> "Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."

It has been held that cost and fee bills are subject to the statute of limitation, as set out in Section 11416, supra, and was upheld in the case of State ex rel Johnson v. Draper, State Auditor, 48 Mo. 56.

In a case where the state is liable for the costs they are due and payable from the state after conviction and sentence, and the parole or suspended sentence is not even an incident to the case itself. After sentence on a felony, the statute of limitation will run after two years from the date of the sentence. It was so held in the case of State v. Kelly, 274 S. W. 731,l.c. 733, where the court said:

> "* * * But the granting of a parole has naught to do with the ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections4156 and 4157, R. S.

> 1919) and that judgment has become a finality (section 4167, R. S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. * * * "

CONCLUSION

In view of the above authorities, it is the opinion of this department, that where, under the law, the state is liable for the costs in a case if a defendant should plead guilty to such a charge and was duly sentenced the State should allow and pay the costs, if not collectible from the defendant.

It is further the opinion of this department that if the defendant is given a parole, which is sometimes called a "bench parole"or "suspended sentence" and he becomes solvent and the costs can be collected from him, then the costs should be turned to the State Treasury if the same had been paid by the State.

It is further the opinion of this department that the state on a plea of guilty and sentence is not liable for the costs if not certified to the State Auditor within two years from the date of sentence.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

ARMORIES: Commander of Missouri National Guard has right to make reasonable rules and regulations governing state armories.

CRIMINAL LAW: Statute prohibits drinking intoxicating liquors at a lawful public assemblage.

March 26, 1940 3/30

FILED 60

Brigadier General Lewis M. Means
Commanding Officer
Missouri National Guard
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion, dated March 5, 1940, which is as follows:

> "The Missouri National Guard has been granted an appropriation by the last two Legislatures for the construction of armories built from these funds and from local community funds, and Works Projects Administration of the federal government. The deeds for the ground upon which these buildings have been or are being constructed are under the state law accepted for the state by the Hon. Lloyd W. King, State Superintendent of Schools.
>
> Under the assumption that, being built from funds appropriated to the Missouri National Guard, the buildings would be under the active jurisdiction and supervision of the Missouri National Guard, a ruling has been made by the undersigned, as the Commanding General of the Missouri National Guard, that no liquor will be served in or on the premises of any of the several newly constructed state armories.
>
> In the city of Sikeston, Missouri, a group of citizens of that city, presumably connected with the City of Sikeston, have prior to the ruling, been holding public dances in the building, and have

had tables and served set-ups for liquor.

There is an easement appearing in the deed for this property in the City of Sikeston, as follows:

IT IS UNDERSTOOD AND AGREED that the City of Sikeston, Missouri, the Board of Education of the City of Sikeston, and the various civic and service clubs of said City of Sikeston shall have a perpetual easement in the use of the building and/or of any buildings to be constructed on the within premises so long as such use does not conflict with the use and benefit of the Missouri National Guard as an Armory.

An opinion is requested on the following points: (1). Do the National Guard Authorities have the authority under state laws, to set out rules and regulations such as mentioned above, or any other rules pertinent to the public use of these National Guard Armories? (2). Is there any enactment in the Missouri Statutes which would preclude the serving of liquor in a public building? (3). In the event the answer to question No. 1 is negative, who does have authority, under state law, to set out rules and regulations for the public use of these National Guard Armories?"

We shall take up the questions presented by you in their order, and on the question of your right to make rules concerning the various armories of the state, we set out Section 13844, Revised Statutes of Missouri, 1929, which charges you with the care of all the equipment belonging to the National Guard. Said section is, in part, as follows:

"There shall be a commanding general of the national guard with the rank of brigadier-general who shall command the same and who shall be responsible only to the

> governor of its drill, equipment, instruction, inspection, service, movements, operations and general efficiency. His office shall be the office of administration and his headquarters the headquarters of the national guard. * * * All other commanding officers shall be responsible to the commanding general for the equipment, drill, instruction and efficiency of their respective commands. Every commissioned officer and enlisted man shall be responsible to the officer under whose immediate command he serves for prompt and unhesitating obedience, and the preservation, care and proper use of public property in his care. * * * "

It is also plain that the armories themselves are to be under the jurisdiction of the commanding officer through his subordinates under Section 13871, which is as follows:

> "Upon the application of all posts of the grand army of the republic, camps of the united confederate veterans, camps of the united Spanish war veterans and of other societies composed of veterans of any war in which the forces of this state have participated, the officer in charge of any armory owned or leased by the state may permit the use of such armory for the meeting of such veteran societies without charge on dates when the same is not in use for military purposes."

It is apparent, therefore, that you, as commanding officer of the Missouri National Guard, have full and complete control over all armories in the state, and it becomes necessary to consider the effect of the easement retained by the grantors in the Sikeston Armory.

It appears from reading the pertinent part of the deed cited by you that four different parties or organizations have a limited right of use to the armory. They are: first, the City of Sikeston; second, the Board of Education of the

City of Sikeston; third, civic clubs of said city, and fourth, service clubs of said city.

It is readily apparent that, under the first of the foregoing divisions, a use by the City of Sikeston as a municipal organization is referred to. In other words, use by it in the furtherance of its statutory powers and functions, as granted by the legislature. It is also plain that the use by the Board of Education must be in its official capacity as such board, duly constituted under the laws of Missouri.

The words "civic club" and "service club" have not been judicially defined in this state, but the common meaning of the words is accepted as being an organization or organizations for the furtherance of the general well being in the locality. One of the definitions given by Webster of the word "civic" is "Of or pertaining to a city or other municipality or citizenship."

It is further provided by the deed that the use of the foregoing organizations of the armory must not interfere with the use of such building or buildings by your organization. Doubtless, you are the one most competent to determine the usage to be made of such building by your organization, and have the right to make such rules and regulations as are consistent with the benefits to be received by the National Guard.

If liquor has been sold or is being sold on these premises by any person or persons without proper license therefor, it constitutes a nuisance under Section 44-a-9, found in Laws of Missouri, 1935, at page 283, and would subject the premises to an injunction suit under which the court may order such building to be vacated for a period of one year. This might involve a question of conflict of the powers of the executive and judicial authorities, which we do not attempt to determine, but, in any event, a temporary injunction would interfere with your use of the building, and you have the right to prohibit the sale of intoxicating liquor on the premises for that reason.

As to your second question, in which you inquire if there is any section of the statutes precluding the serving of liquor in a public building, we direct your attention to Section 4249, Revised Statutes of Missouri, 1929, which is as follows:

> "It shall be unlawful for any person in this state to enter any schoolhouse or church house in which there is an assemblage of people, met for a lawful purpose, in a drunken or intoxicated condition, or to attend any other assemblage of people, met for lawful purpose, at any other public place, in a drunken or intoxicated condition, or to drink or offer to drink any intoxicating liquors in the presence of any such assembly of people, within this state, and every person or persons, so doing, shall be guilty of a misdemeanor, and fined not less than five dollars or more than twenty-five dollars for said offense."

Under this statute, it is a misdemeanor for any person to drink or offer to drink any intoxicating liquors in the presence of any lawful assemblage of people in any public place in this state.

In view of the answer to your first question, it is unnecessary to answer your third.

It is our conclusion, therefore, that you, as commanding officer of the Missouri National Guard, have the right to make such reasonable rules and regulations concerning the use of the armories under your jurisdiction as are consistent with the maximum benefits to be obtained by your organization.

It is our further conclusion that the drinking of intoxicating liquors by persons at a lawful assembly in these buildings constitutes a misdemeanor.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

ARMORIES:
MUNICIPAL CORPORATIONS:
POWER TO LEVY TAXES FOR MAINTENANCE OF SAME:

Municipal corporations, for the purpose of maintaining armories owned by the state, may levy taxes, or with the consent of two-thirds of the legal voters thereof issue bonds for that purpose.

May 31, 1940

6-1

FILED
60

Honorable Lewis M. Means
The Adjutant General
Jefferson City, Missouri

Dear Sir:

This is in reply to your request of the 2 th, which is in the following language:

> "The Missouri National Guard is engaged in the construction of National Guard armories at various town in Missouri where National Guard units are located. These armories are built in cooperation with the State of Missouri through the Missouri National Guard, the Federal WPA, jointly with a local sponsor in the community, either the City, the County or some Civic organization. The title of the real estate is vested in the State of Missouri for the use and benefit of the Missouri National Guard.
>
> "In Maryville, the City of Maryville contemplates voting a bond issue in order to raise their pro rata share of funds for the construction of the armory. The City attorney has raised a question of law as to whether or not a City can legally vote bonds, payment for which is assessed the tax payers over a period of years for payment on a building constructed and titled in the name of the State of Missouri.
>
> "An opinion is requested of the Attorney General; First, Can a City legally authorize an issuance, sale and use of money derived from the

> sale of the bonds for the building of an armory titled in the name of the State for the use of the Missouri National Guard. Second, In the event the Attorney General rules this action can be legally done, request information on proper procedure."

The powers and duties of cities, towns and villages are derived from the statutes applicable to such municipal subdivisions. Referring to the Revised Statutes of Missouri pertaining to the subject of the authority of municipal corporations to support and maintain armories we find that Section 7213, R. S. Missouri 1929, provides as follows:

> "All cities, towns, villages and counties in this state are hereby given power and authority to build or acquire, by purchase, lease, gift or otherwise, suitable armories, drill halls and headquarters, and the land necessary therefor, for such organizations of the national guard of Missouri as may be stationed or located therein, and to provide for the maintenance and repair of the same."

Section 7214, R. S. Missouri 1929, provides as follows:

> "In case any organization of the national guard of Missouri now or hereafter occupies any armory, drill hall or headquarters not owned or leased by the city, town, village or county wherein it is located, such city, town, village or county is hereby given power and authority to provide for the maintenance and repair of such armory, drill hall or headquarters."

Section 7215, R. S. Missouri 1929, provides as follows:

> "The term 'maintenance,' as used in sections 7213 and 7214, shall include light, water, heat, fuel, power, ice and the wages of janitors, armorers and other employes necessary for such armories, drill halls and headquarters."

Said Section 7213 authorizes such cities to acquire suitable armories, etc. Section 7217, R. S. Missouri 1929, which refers to the authority of cities to incur indebtedness for the purpose of carrying out its powers and duties, provides as follows:

> "The various cities, towns and villages in this state, whether organized by special charter or under the general laws of the state, may contract a debt or debts in excess of the annual income and revenue for any such year, for any purpose authorized in the charter of such city, town or village, or by any general law of the state, upon the assent of two-thirds of the legal voters of such city, town or village voting at an election held for that purpose: Provided, such indebtedness so to be contracted shall not, with the existing indebtedness of such city, town or village, exceed in the aggregate five per cent. on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; and provided fu ther, that the proper authorities of every such city, town or village incurring such indebtedness shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of

> the principal thereof, within twenty years from the time of contracting same."

It will be seen that this section authorizes such cities, after they have been empowered by two-thirds vote of the voters, to contract debts in excess of their annual revenue and to issue bonds in payment of same.

The question which you submit is whether or not the city may issue bonds for money to be used for the purpose of paying for the building of an armory titled in the name of the state for the use of the Missouri National Guard.

This department, by an opinion dated August 4, 1938, written to Honorable Wayne V. Slankard, Prosecuting Attorney, Neosho, Missouri, ruled that county courts may give or convey lands of the county to the state for armories. We also refer you to our opinion dated January 4, 1938, as to the manner of accepting titles to armories. We are enclosing a copy of the Slankard opinion for your information, and refer you to the opinion of January 4th to your department for further information.

By Section 7 of Article XIII of the Missouri Constitution it is provided the General Assembly shall provide for the safe-keeping of the public arms, military records, banners and relics of the state.

Referring back to said Section 7213, it seems that the lawmakers have intended that cities, towns, villages and counties are authorized to build armories. This section also authorizes such subdivisions to maintain them under the reasoning followed in the Slankard opinion, and under the authorities herein cited it seems that if the city or county would be authorized to acquire lands for an armory and place a building thereon and then convey it to the state for an armory, then they may place the building for the armory on such lands which belong to the state. Since the armory is strictly for a public purpose and it is placed on lands which are held by the state, there can be no question but that

moneys expended thereon by a city would not be in conflict with the provisions of the Constitution which prohibits public funds from being expended for other purposes than public purposes.

In the case of Dysart v. City of St. Louis et al., 11 S. W. (2d) 1045, the question of the authority of that city to issue bonds for the purpose of purchasing an airport was before the court and the court held such issuance was authorized and that the expenditure was for a public purpose.

So long as the city stays within its constitutional limit on the amount of its levy and the amount of bonded indebtedness, we think the city would be acting within its authority in issuing bonds for the payment of a building for an armory regardless of the fact of whether or not the title to the lands upon which the armory is placed is in the State of Missouri for the use of the National Guard.

As to the procedure for voting the bonds, we refer you to Sections 7218, 7219, 7220 and 7221, R. S. Missouri 1929, and as to the manner in which the title should be taken to the lands for the armory, we refer you to Laws of Missouri 1933 at page 251.

CONCLUSION.

From the foregoing it is the opinion of this department that moneys expended for the building of an armory are moneys expended for public purposes, and that cities, towns and villages, under the provisions of the Constitution and the statutes of this state, are authorized to vote bonds and to levy and to collect taxes for the purpose of building such armories.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOLS: Only resident pupils may be counted in determining teaching units for state apportionment of funds.

9-13

September 10, 1940

FILED
60

Hon. Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated August 24, 1940, together with your explanatory letter of September 7, in which you inquire whether non-resident students in daily attendance in grades under the ninth grade may be counted in determining teaching units.

Resident students are required by law to attend the schools in the district of residence, with certain exceptions. One of the exceptions is found in Laws of Missouri, 1931, at page 344, and this provides that when an adjoining school is more accessible to a student the county superintendent may assign such student to the adjoining district. In this section is also included the following:

> "* * * Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: * * * "

Again, in the Laws of Missouri, 1935, page 351, under Section 16, in an act providing that pupils resident in a district which did not maintain a high school may be assigned to a district having a high school, on payment of the proper tuition, we find the following exception to the intent of the legislature with regard to the enumeration of such pupils in determining the teaching units:

> "* * * but the attendance of such pupils shall not be counted in determining the teaching units of the school attended; * *"

In Laws of Missouri, 1931, at page 343, we find the following:

> "Sec. 15. District may combine for school purposes.-- Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more districts to a schoolhouse elsewhere, and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils: Provided further, that in such temporary combinations the record of daily attendance of pupils from each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments."

It is apparent, from each of the foregoing statutory provisions, that only resident pupils may be counted in determining teaching units, as defined in Section 14, Laws of Missouri, 1931, at page 342. In Missouri School Laws

of 1938, as published by Lloyd W. King, Superintendent of Schools, we find the following administrative rule established by this department:

> "Only the attendance of the last school term of resident pupils in either the grades or high school can be counted for the purpose of establishing teaching units." (P. 48).

These rules established by the department which supervises our public school system should be given consideration where not directly in conflict with any statutory provision.

CONCLUSION.

It is therefore the conclusion of this department that non-resident pupils in either the grade or high school cannot be counted in determining teaching units as defined by statute for the purpose of apportioning state school funds.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

STATE BONUS ACT: Wife of a deceased veteran not living with him at the time of his death; and not divorced is entitled to bonus under Section 3 of the Bonus Act; she may waive rights and the next person in legal succession may make application.

December 14, 1940

12-16

FILED
60

Honorable Lewis M. Means
Brigadier General
The Adjutant General
Jefferson City, Missouri

Dear Sir:

We are herewith incorporating your letter in this opinion in regard to Raymond J. Downing's claim for a bonus. Your letter is as follows:

"The Bonus Commission, operating under this department, has for consideration, a claim for a bonus on behalf of a deceased veteran, Raymond J. Downing, Army Serial No. 3,268,750.

The veteran, if living, would be entitled to the Missouri bonus, in view of the fact that his record, residence, etc. have fulfilled all requirements for participation in the bonus.

Raymond J. Downing died February 9, 1923 and had not filed claim for the bonus at that time.

The claim before the Commission for consideration is filed by Cornelius J. Downing, father of the deceased veteran. The evidence in this case is as follows:

The veteran, Raymond J. Downing, married Mrs. Dora York, a widow, early in 1919 and lived with her only two months, but,

> though separated, no divorce was ever obtained by either the deceased veteran or his enstranged wife. All available information in this office is to the effect that the woman has since been married two additional times and is at present married. The mother of the veteran is deceased.
>
> In view of Section 3 of the law authorizing the state bonus, and in which the wording is as follows: 'In case of the death of any person who would, if living, be entitled to the bonus under this act, the same shall be paid to the following persons, in the order named and none other: first, surviving wife or husband; second, surviving child, and if there be more than one child surviving, then equally among such children; third, surviving mother; fourth, surviving father,' the following opinion is desired:
>
> 1. In view of the fact that the deceased veteran and his wife had lived together only two months, were separated, but had not obtained a legal separation, can the Bonus Commission consider the claim of the father as a valid claim, and so pay to him the state bonus?
>
> 2. In the event the ruling on the above question is in the negative, can the Bonus Commission pay to the father the bonus, provided he secures a complete release from the veteran's widow?"

Under the provisions of Section 3 of the authority, commonly called the Bonus Act, the facts that Downing was married at the time of his death early in 1919; that he had only been married two months and that he was separated

from his wife would nevertheless in law still constitute her as his legal wife. It is my understanding that we have heretofore ruled that a divorced wife could not obtain the bonus of her former deceased husband. There is no provision in the act which prevents a legal wife upon her remarriage from claiming the bonus of her former husband.

We are therefore of the opinion that Downing's former wife, now Mrs. Dora York, can make application for the bonus and receive the same under the Act as she would be in first class, to-wit, surviving wife or husband.

As to the other question, we assume that there were no children and as the mother of the veteran is deceased, the fourth provision as to descent would prevail providing the one in the first class entitled to the bonus would waive their rights to the same. Therefore, if the surviving wife will execute a form of waiver to her right or claim to the bonus, the father can make application for the same accompanied by the waiver. If service is established and satisfactory proof is furnished to the Bonus Commission, the father can receive the bonus.

Very truly yours

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
OWN:RT

AGRICULTURE: **AAA not required to register for sale of fertilizer.**

February 16, 1940

717

FILED
62

Mr. M. F. Miller, Director
Missouri Agricultural Experiment Station
Columbia, Missouri

Dear Sir:

You request an opinion on the following statement of facts:

The United States Department of Agriculture, through the Agricultural Adjustment Administration, of Washington, D. C., is offering farmers of the State of Missouri fertilizer for the purpose of soil building in this State. They are selling the fertilizer at Thirty-eight ($38.00) Dollars per ton, which includes the cost of freight. According to their pamphlet No. NCR-420, issued November 17, 1939, there is no question but what they are selling the fertilizer direct to the farmers and receive the pay for the fertilizer by deducting the amount from the Government allowance for the non-planting of certain crops.

Your inquiry reads as follows:

"1. Is this fertilizer subject to registration and license fee?

"2. Factors which might affect:

a. Does this transaction constitute a sale?

b. Does Federal Government have authority to ship into Missouri under Interstate Commerce Law, thus possibly superseding Missouri law?

c. Do federal regulation supersede State law?

"3. What should be done with two cars on way?"

Section 12589 R. S. Missouri, 1929, reads as follows:

"Before any commercial fertilizer or material to be used as a fertilizer, the selling price of which exceeds five dollars per ton, is sold, offered or exposed for sale in this state, the manufacturer, importer, corporation, company or person who sells or causes the same to be sold, offered or exposed for sale, shall file annually for registry with the Missouri agricultural experiment station at Columbia, a statement which shall certify as follows: (1) The name, brand, or trademark under which the fertilizer is sold; (2) the name and address of the manufacturer of the fertilizer; (3) the guaranteed chemical composition of the fertilizer, expressed in the following terms: (a) Per centum of nitrogen, (b) per centum of available phosphoric acid, and in the case of an undissolved bone, the per centum of

> insoluble phosphoric acid; (c) per centum of potash soluble in distilled water."

It will be noticed under the above section that before any commercial fertilizer be sold, the manufacturer, importer, corporation, company or person shall register the same in the Missouri Agricultural Experiment Station at Columbia. This section is not applicable to the Government which is selling the product direct to the farmer. The Agricultural Adjustment Administration law was enacted by Congress and in case of a conflict of the United States Laws and the State Law the United States Law prevails. It was so held in the case of Harrison v. St. Louis-San Francisco Railway Company, 232 U. S. 318, 34 Sup. Ct. 333. In that case the Supreme Court of the United States held that a state cannot pass a law that would directly or indirectly, in any form deprive the United States of a right conferred on any instrument of the Government by the Constitution and the Laws of the United States.

A very similar case which involved the question of gasoline tax was decided recently in the Supreme Court of the United States, in the case of Panhandle Oil Company v. Mississippi, 277 U. S. 218, 72 L. Ed. 857. In that case in denying the right of the state to collect the tax from the Panhandle Oil Company on gasoline sold to the United States Fleet and hospital the court said:

> "The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Art. 1, Sec. 8. That authorization and laws enacted pursuant thereto are supreme (art. 6); and, in case of con-

> flict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions. The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the Agricultural Adjustment Administration need not register or pay a license fee upon the fertilizer sold by the United States to the farmers.

It is further the opinion of this department that since the Agricultural Adjustment Administration has been legally enacted by Congress that it

need not follow the Missouri Law in reference to the sale of fertilizer as set out in sections 12588 to 12596, inclusive.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

TAXATION: Power of trustee appointed under Sec. 9953b, Laws of Missouri, 1939, pp. 851-852, to enter into contracts of sale.

February 21, 1940

2-26

FILED
62

Hon. John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 15th asking for an opinion upon the following matter:

> "Pursuant to the authority conferred by the provisions of Section 9953b found on pages 851 and 852 of the laws of Missouri 1939, our County Court appointed a trustee who bought up a great many parcels of property at the tax sale held in November of last year. The amount of delinquent taxes on a few of these properties is a substantial sum. In two of these cases the amount is as much as $2000.
>
> "Inquiries have been made of the Court as to whether it would be possible for the trustee to sell such property on installments. One of the arrangements which has been suggested by a prospective purchaser is that stated sums should be paid monthly to the County Collector under the terms of a memorandum agreement signed by the prospective purchaser and the trustee, such agreement to contain provisions upon the completion of the payment of the installments provided for in the contract the trustee should execute the deed conveying the property to the purchaser. Several other sug-

gestions have been made but all of them assume that the trustee would have the right to enter into a contract to sell the property upon the payment of installments, rather than an immediate transfer of the title to the property.

"I should like your opinion as to whether or not the trustee may make such sales. If in your judgment such sales are proper would you suggest the proper procedure to be followed?"

Section 9953b, Laws of Missouri, 1939, pp. 851-852, provides as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the

grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the City of St. Louis. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees. Provided further, that if at any such sale any person bid a sufficient amount to pay in full all de-

> linquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

Where the language of a statute is clear and unambiguous and its meaning clear and unmistakable, there is no room for construction. State ex rel. v. Thompson, 5 S. W. (2d) l. c. 59.

The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. State ex rel. v. Hackman, 314 Mo. 33.

This section is plain and unambiguous and declares its purpose and provides a method of carrying it out.

"A trustee cannot be permitted to deprive himself of a power to sell, conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust." 26 Ruling Case Law 1290.

CONCLUSION

It is the conclusion of this department that installment contracts of sale would not be authorized under this section.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

WOJ:HR

TAXATION AND REVENUE :

1. Trustee may bid up to total amount of taxes, interest, penalties and cost.
2. County court may not, by order, control trustee in bidding.

February 23, 1940.

2-24

FILED
62

Honorable John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Mitchell:

We rendered you an opinion on October 19, 1939, which has been withdrawn and in lieu, thereof, are rendering an opinion on your inquiry of October 14, 1939, said inquiry being as follows:

"At pages 851 and 852 of the Session Acts of 1939 by Section 9953b the legislature provided authority for the counties to appoint a trustee to bid in property in event such property had been previously offered for sale twice and in the event no one at such previous sales or at the current sale should bid the total amount due for taxes, penalties and costs.

"I do not find any specific provisions covering the extent of the power and authority of such a trustee to take possession of and rent such property as may be purchased by him as trustee. The statutes appear to give anyone who purchases property at either the first or second offering of a tax sale the right to rent and manage the property after the first year has elapsed from date of purchase subject to certain restrictions.

"It is to be noted that Section 9953a, found on page 851, expressly provides

that there shall be no redemption after a purchase made at the third offering. Consequently, a purchaser at such a sale has the right, clearly, to the immediate possession and control under the premises, so far as the title holder is concerned. Off hand there does not appear to be any reason why, under the statutes, the trustee should not have the same right, by necessary implication.

"On the other hand there is no specific authority given to the trustee to do anything with the property except to sell it on order of the County Court.

"I should like your opinion as to the nature and extent of the powers of the trustee with respect to the control and management of the property which he bids at tax sales from the time he becomes the purchaser of same until they are disposed of according to law.

"I should also like to have your opinion as to whether the trustee may lawfully bid any less for a given property than the total amount of the taxes, penalties, interest and costs charged against it.

"I should also like to have your opinion as to whether under the provisions of the first sentence in Section 9953b, the County Court would have the power to control by appropriate orders the amount of the bids to be made by the trustee on various properties. In other words is the jurisdiction of the County Court confined to the appointment of the trustee, or having appointed him may the Court also direct the trustee to refrain from bidding on some properties, and to bid on others for certain amounts only?"

I.

Section 9953b, Laws of Missouri 1939, page 851, 852 is, in part, as follows:

> "It shall be lawful for the County Court of any County, * * * to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid, on any such land or lots." (Underscoring ours)

CONCLUSION

Therefore, it is the opinion of this department that, under the provisions of the above statute, the trustee or trustees may use their discretion in bidding on such lands and lots and that the only prohibition from bidding, on such lands and lots, is when any person bids a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs.

II.

Section 9953b, supra, is, in part, as follows:

> "It shall be lawful for the County Court, * * * to designate and appoint a suitable

> person or persons with discretionary authority to bid at all sales * * * . All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court * * * . Upon appointment of any such person or persons to act as trustee * * * a certified copy of the order making such appointment shall be delivered to the collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the collector. Compensation to the trustees * * * shall be fixed by the authorities hereinbefore designated * * * ."

The county court may therefore use its discretion in the appointment of a trustee or trustees, in ordering the property sold and fixing the fee of the trustee, within the limit provided by the statute, but said statute specifically vests in the trustee or trustees "discretionary authority to bid at all sales to which Section 9953a is applicable".

In State ex rel. Barrett v. Boeckeler Lumber Co., 301 Mo. 445, 532, speaking of whether a statute means what it says when it is plain, the Supreme Court of this state en banc said:

> "Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written is as plain as the language of that statute, and in that language there is no ambiguity."

To like effect, see State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33, decided by the Supreme Court en banc in 1926, where the court said:

> "The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction."

CONCLUSION

Therefore, it is the opinion of this department that the trustee or trustees appointed under the provisions of Section 9953b, supra, have discretionary authority to bid on all sales to which Section 9953a is applicable as statutory trustee or trustees and in such bidding may not be controlled by order of the County Court.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

ELECTIONS;
COUNTY AUDITOR: May be a candidate for another office without resigning as County Auditor.

April 18, 1940

H-19

FILED
62

Hon. John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 11, 1940, which is as follows:

> "Our County Auditor was elected in the general election of 1938 for a four year term beginning January 1, 1939. He is contemplating making the race in the coming primary for sheriff in this County. I should like to have your opinion as to whether or not, under the above circumstances, he may be a candidate for sheriff in the coming elections without first resigning his office as County Auditor."

We have carefully examined the provisions of Articles 10 and 11, Chapter 61, R. S. Mo. 1929, either of which might be applicable to Buchanan County, and find nothing therein that prohibits the County Auditor from becoming a candidate for another office while still holding the office of County Auditor. There being no expressed restriction in these articles we have searched the general statutes and Constitution for such a restriction and find none.

Section 10257, R. S. Mo. 1929, pertains to the declaration to be filed by a candidate for nomination. The candidate is required to state in his declaration that "if nominated and elected to such office he will qualify". This provision, however,

does not require the person to be eligible for the office he is seeking at the time of the primary or general election. In State ex rel. v. Breuer, 235 Mo. 240, it was contended that respondent could not hold the office of Circuit Judge because at the time of his nomination and election he was County Collector and had not at said time paid over to the County all moneys due it and made a final settlement. His term as Collector ended in March, 1911, while his term as Circuit Judge began in January, 1911. He resigned as Collector and made his final settlement before qualifying as Judge of the Circuit Court. The court held that this removed his disability, saying, l. c. 250:

> "The word 'eligible' in reference to a candidate for a public office, is not always used by law-writers with the precise point in view that is presented by the learned counsel for the relator in this case, that is, whether it means eligible at the date of the election or appointment, or at the date of taking possession of the office. It may sometimes be used in reference to the one date and sometimes to the other and whether the reference is to the one or the other depends on the context and on the subject; in view of the context in which the word 'eligible' is used in section 19 of article 2 of the Constitution and of the particular subject to which it relates, I am satisfied that it refers to the date that the candidate is to take possession of the office."

We think this same principal applies to the instant situation in that the County Auditor, who desires to run for Sheriff, need only be eligible for the office of Sheriff at the time he qualifies and takes possession of the office. We make this explanation because of the rule that one person cannot hold incompatible offices. There can be no question but what the offices of County Auditor and Sheriff are incompatible, since the Auditor is required to check the records and accounts of the

Sheriff on some occasions in counties where these statutes apply. As heretofore pointed out, while the County Auditor could not accept the office of Sheriff while holding office as Auditor, this objection can be obviated by his resignation, or, as was ruled in State ex rel. v. Bus, 135 Mo. 325, 330, the acceptance of the office of Sheriff would be an implied surrender of the office of County Auditor.

CONCLUSION.

It is therefore our opinion that the County Auditor of Buchanan County may become a candidate for the office of Sheriff of said County without resigning his present office.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

LLB:CP

SHERIFF ST. LOUIS COUNTY: Appointment of deputies, and salaries.

December 6, 1940.

12-9

FILED
62

Hon. Forrest Mittendorf
2671 Carson Road
Overland, Missouri

Dear Sir:

Receipt is acknowledged of your letter in which you asked for an opinion upon several questions. Your first question pertained to the effective date of S. C. S. H. B. 480, enacted by the General Assembly of 1939, and found in Laws of Missouri 1939, at page 679 and following. Under the opinion referred to in your letter the entire act became law on November 1, 1939, but by the terms of the act the payment of salaries to the officers mentioned in Section 1 is not to be in force until the terms of the officers holding at the time of the taking effect of the act had expired in order that it might not be in conflict with prohibition against increasing salaries during the term.

Your opinion request presents these additional questions for answer. Is Section 1, Laws 1927, p. 465 repealed, by the act appearing in Laws 1939, p. 679? And, what is the authority of the County Court with respect to approval of the individual appointed as deputy sheriff and the fixing of salaries?

Section 1, Laws 1927, p. 465, was not placed in its proper position in the Revised Statutes of 1929. The appendix of the Revised Statutes of 1929 (Vol. 3, p. 3932) gives legislative recognition to this error and the Section was then incorporated as Section 14872, R. S. Mo. 1929.

Said Section provides for the appointment of not to exceed 20 special deputy sheriffs in counties having a population of not less than 100,000 or more than 250,000 inhabitants. The compensation provided for these

special deputies is not more than $5.00 per day. These appointments before becoming effective must have the approval of the Circuit Court.

The act appearing in Laws 1939, p. 679, also provides for the appointment of deputy sheriffs in certain counties. However, the provision there relates to counties of from 200,000 to 400,000 and to regular deputies appointed by the sheriff. Section 7 of the act provides: "It shall be the duty of the * * * sheriff of the county * * * to appoint deputies * * * to properly perform the duties of * * * (his) office." Thus it is clear that regular deputies appointed under this provision are not subjected to the approval of anyone.

Section 7 further provides: "The salary of the deputies * * * shall be determined by the county court of said county and made a matter of need by said court and paid out of the county treasury." This provision is clear and needs no further exposition except to say that it vests the county court with the authority to fix the salaries of the deputy sheriffs. However, there is nothing in the statute that requires the county court to fix the salaries of the deputies on a uniform basis commensurate with the duties performed.

Our research does not disclose that Section 14872, supra, has been expressly repealed. It is not repealed by the Act appearing in Laws 1939, p. 679, because there is no inconsistency between the two. The acts relate to different size counties and a different class of deputy sheriffs. In order for a repeal by implication to be effected there must be an irreconcilible inconstancy existing between later and earlier statutes (State ex rel. Wells v. Walker 34 S. W. (2d) 124). Section 7, Laws 1939, p. 679, and Section 14872 R. S. Mo. 1929, are entirely harmonious, in that one prescribes the procedure for the appointment of regular deputies and the other for special deputies. And this is true even though there be a county that would fall within both the population classes fixed by these acts.

And in addition to the above mentioned laws we have the general statute applicable to the sheriffs of all counties. Section, 11513, R. S. 1929, which provides that any sheriff may appoint one or more deputies with the approbation of the Judge of the Circuit Court of the county. This law was first enacted in its present form in 1855 and has been carried in the statutes in the form in which first

enacted to the present day. Both of the acts mentioned in your letter are of much later date and are special rather than general.

In addition to the rule mentioned above concerning the construction of statutes, we think the rules set out in the following quotation from the case of State ex rel. v. Brown, 334 Mo. 781, l. c. 787, are also applicable to the problem.

> "It will be observed that Section 4556, except the last proviso which is not pertinent to the matter here in controversy, relates to corporations in general while Section 5613 relates only to a particular class of corporations, to-wit, building and loan associations. In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view of giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' (Tevis et al. v. Foley, 325 Mo. 1050, 1054, 30 S. W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S. W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S. W. 122)."

CONCLUSION

It therefore is our conclusion that Section 1, Laws of 1927, p. 465, has not been repealed either expressly or by implication; that a new special section of law has been enacted applying to all counties of the

size mentioned in the act in which class St. Louis County falls; that the new act is not in conflict with Section 1, Laws of 1927, p. 465, mentioned above, nor is in conflict with the general act, Section 11513, R. S. 1929, but is rather an exception to it. It is our further conclusion that the sheriff of St. Louis County may now appoint his regular deputies without the approval of anyone, but that the county court is vested with the authority to fix the salaries of the deputies appointed and may do so without regard to keeping said salaries uniform.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General.

W. O. JACKSON
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(ACTING) Attorney General

LLB-WOJ/mc

ELECTIONS: Person can include nickname along with real name in filing for offices.

February 29, 1940

3-1

FILED
63

Mr. John A. Mooney
County Clerk
Phelps County
Rolla, Missouri

Dear Sir:

This Department is in receipt of your letter of February 9th, wherein you make the following inquiry:

> "Will you please render an opinion as to whether a 'nick name' may be enclosed in parenthesis along with a candidate's name on the election ballots? For instance; John J. (Happy) Smith."

Diligent search of the opinionsrendered by this Department do not reveal that we have ever passed on this question. However, the question of whether or not a nickname can be included along with the legal Christian name of a candidate for office in filing and printing on the ballot, has been more or less sanctioned by custom. It has remained unchallenged as far as the courts of our State are concerned.

Section 10257, R. S. Mo. 1929, is as follows:

> "The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating

his full name, residence, office for which he proposed as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

> I, the undersigned, a resident and qualified elector of the (_____precinct of the town of _____), or (the____precinct of the____ward of the city of_____), county of _____ and state of Missouri, do announce myself a candidate for the office of _____on the _____ ticket, to be voted for at the primary election to be held on the first Tuesday in August, _____, and I further declare that if nominated and elected to such office I will qualify.
>
> (Signed)_____."

The statute uses the expression, "stating his full name." Applying that to the instance which you present, it appears that if the candidate's name is John J. Smith and he desires to include the nickname "Happy" for the purpose of identifying himself or calling it to the attention of the voters that he is the particular Smith, among many others, and wishes to identify himself as the same, we know of no legal obstacle to prevent it. Many people who have carried nicknames since early childhood are better and more familiarly known under the nickname than they are when reference is made to the real name. No doubt the purpose

of a candidate in desiring to include his nickname in filing is for this reason.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

HIGHWAY PATROL; Motor Vehicles and Stolen Property:

Motor vehicles seized by highway patrol should be held by them subject to the order of the court having jurisdiction of the offense in connection with which they are seized.

3-24

March 28, 1940.

FILED
63

Missouri State Highway Patrol,
Jefferson City, Missouri.

Attention: Captain R. E. Moore,
General Headquarters.

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this Department based on the following statement of facts:

"A stolen car is recovered by the State Highway Patrol and stored in a private garage pending the establishment of ownership. The owner is notified to appear and claim the car, but in the meanwhile an insurance company who holds a mortgage on the car appears to claim it on the grounds that the registered owner is in arrears on his payments and they have the right under their contract to take possession wherever they may find the car. To whose custody should the car be released?

A car comes into the temporary possession of the patrol by virtue of the owner being arrested and held for some offense. A finance company who holds a mortgage on the car hears of the location of the car being held and appears to claim the car on the grounds that the payments are in arrears and they have the right under contract to take possession of the car wherever they may find it. Should the member of the patrol release the car to the claimant, and if so, is he liable for damages to the registered owner on the grounds that the owner has an equity in the car and might be deprived of such equity by this action?

What right has a member of the patrol to impound or hold for any purpose whatsoever, except for the purpose of evidence, the motor car of any person arrested for an offense against the laws of this state which does not call for confiscation of such equipment?"

The State Highway Patrol is a creature of the statute, and we must look to that statute for its powers and duties. This rule is announced and applied so often and generally that we do not deem it necessary to cite authorities in support of it.

Referring to the statutes under which the patrol is created we find that in 1931 the highway patrol act was passed and that, at page 234 Laws of Missouri 1931, Sections 12, 13 and 14, the duties of the patrol are set out. These sections provide as follows:

"Section 12. It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs

licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes.

Section 13. The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken.

Section 14. Any person arrested by a member of the patrol shall forthwith be taken by such member before the court or magistrate having jurisdiction of the crime whereof such person so arrested is charged there to be dealt with according to law."

Your request pertains principally to cars which have been seized by the Highway Patrol either because the same are stolen or were used in connection with some criminal offense. Our general statutes have made provision for the disposition of such property.

Section 3774 R. S. Mo. 1929, provides as follows:

"When property alleged to have been stolen, purloined, embezzled or obtained by false pretenses, or to have been obtained in any of the modes specified in the article concerning offenses against public and private property, shall come into the custody of any sheriff, coroner, constable, marshal, or any person authorized to perform the duties of such officers, he shall hold the same subject to the order of the court or officer authorized to direct the disposition thereof."

It will be noted that this section in addition to providing for the disposition of property which is stolen, purloined, embezzled or obtained by false pretenses, applies also to properties which have been obtained in any of the modes specified in the article concerning offenses against public or private property.

Article 5 of Chapter 30, which includes Sections 4036 to 4174, inclusive, relates to offenses against property which would include both public and private property. There are so many different offenses named in this article that we are not specifying them here, but will say that this article applies to almost any offense that might be committed against public and private property. Therefore, any property obtained by the officers in the enforcement of the provisions of said article 5 would be held and disposed of as is provided by said Section 3774.

Section 3775 R. S. Mo. 1929, provides as follows:

"Upon receiving satisfactory proof of the title of any owner of such property, the magistrate who shall take the examination of the person accused of any of the offenses referred to in the preceding section, may order the same to be delivered to such owner, on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by

such magistrate, which order shall entitle the owner to demand and receive such property."

Following that section is Section 3776, which authorizes the magistrate to deliver to the owner, on proper proof, such property after necessary expenses for preservation have been paid.

Section 3777 provides that the court, after conviction and upon proof of ownership of such property, may direct it to be turned over to the proper owner after having paid the necessary expenses incurred in the preservation of such property.

We refer particularly to these sections for we think this is the plan by which the lawmakers have intended to handle and dispose of property seized by the officers in connection with the enforcement of the criminal laws of the state. This property is sometimes held until the case is finally disposed of and then released to the rightful owner.

In the case of State of Missouri v. Rebasti, 267 S. W. 858, at page 860, the court, in discussing the authority of officers to seize and hold the property of the defendant for evidence said:

"Being lawfully arrested the officers have a right to seize him and his possessions in the room where he was arrested and take from him any article which might be used in securing his conviction." (Citing cases.)

The cases cited in the Rebasti case, supra, hold that any evidence legally seized by the officers may be held as evidence pending the final determination of the offense for which the defendant is arrested.

In the case of State of Missouri ex rel. Zimmerman v. Schaper, 152 Mo. App. 538, a constable was sued on his bond for keeping dangerous explosives which he had

seized from a party who was charged with concealing such explosives. In that case the court held that since the charge of keeping dangerous explosives was not one of the cases in which the officer was authorized to take possession of the property as directed by Section 3774, then the constable was not acting in his official capacity and would only be liable personally for any damages which resulted on account of the explosion of the dynamite which he had in his possession.

We are calling attention to this particular case for the reason that there are instances in which the officer is not authorized to seize and hold certain properties. Since the Highway Patrol Act, Section 13, provides that the members of the patrol shall have the powers now or hereafter invested by law in peace officers, the same rule would apply to the powers of the patrolmen to seize properties as apply to any other peace officer.

Referring to the second paragraph of your request, then, and applying the provisions of the statute hereinabove cited relating to the disposition of property seized by an officer, it would seem that the duty of the highway patrol, when any of the members seize a car, or any other property, which is stolen or under suspicion of having been stolen, is to hold this property subject to the order of the court or officer authorized to direct the disposition thereof.

Under this second paragraph you state a case where the patrol comes into possession of a car by virtue of the owner being arrested and held for some offense. Since it seems from the statutes referred to above pertaining to disposition of property which has been seized by an officer in connection with his duties in the enforcement of the criminal laws of the state that such property should be placed in the custody of the court, then as a practical proposition and a safe way to handle such property, we think that the patrol should not act as a judge on the question of ownership, but should release the property under the order of the court in which the offense is pending under which the defendant is charged and the property held. While the mortgagee may

have a contract with the owner of the car, which would authorize it to take possession of the car under certain contingencies, yet, we think that the patrol when it seizes such an automobile would be exercizing its powers more carefully by requiring such mortgagee to make its proof of right of possession to the court having jurisdiction of the case before releasing such property.

On your last question, as to the rights of the patrol to impound or hold for any purpose whatever, except for the purpose of evidence, a motor car of any person arrested for an offense against the laws of this state which does not call for confiscation of such property, will say, applying the foregoing rules to the powers and duties of the officer in such cases, and, since we do not find any statutory authority which would authorize the patrol to impound or hold property other than set out in the statutes hereinabove referred to, we do not think the highway patrol has authority to impound and hold any property except for the purpose of evidence, and then he holds this property subject to the order of the court in which the charge is pending.

CONCLUSION.

From the foregoing, and answering your first question, it is the opinion of this Department that when the highway patrol has seized an automobile or any other property in connection with the violation of a criminal law that it should only dispose of this property subject to the order of the court in which the offense is pending.

Second. Answering your second question, it is the opinion of this Department that since the patrol is not authorized under the statutes to pass on the question of ownership of a motor vehicle which has been seized by the patrol, that it should not release the motor vehicle to any person other than the owner without the order of the court which has jurisdiction over the offense in connection with which the motor vehicle was seized.

Third. Answering your third inquiry, it is the opinion of this Department that the highway patrol is not authorized to impound or hold for any purposes what-

soever, except for the purpose of evidence, the motor vehicle or any other property found in the possession of a person who is arrested for the violation of some criminal law of this state.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General.

TWB:CP

COUNTY JUDGE'S QUALIFICATIONS: MORTGAGOR UNDER SCHOOL FUND LOAN:

The fact that a county judge elect has school funds borrowed from the county does not disqualify him from being elected as a county judge.

November 22, 1940

11/22

FILED 63

Mr. Alfred F. Moeller
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this Department on the following statement of facts:

> "I would like to have your opinion as to whether the fact that a Judge-elect of the County Court has a school fund loan on his property would disqualify him from assuming said office."

The qualifications of a county judge are prescribed by Section 1824, R. S. Mo. 1929, in the following language:

> "* * * Every judge of * * * a county court shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election; * * *."

On the question of the authority of a county officer to borrow school funds, we find that Section 9244, R. S.

Mo. 1929, provides as follows:

> "The county court shall not loan any money belonging to the school fund to any officer of the county or his deputy nor shall such officer or his deputy be accepted as security on the obligation given by the person borrowing. Any officer of the county who shall violate the provisions of this section by authorizing any such loan or drawing any warrant for moneys loaned in violation of this section shall be held responsible for the sum so loaned, with interest thereon to be recovered in the name of the county to the use of the district whose fund has been so used."

It will be noted that the provisions of this section do not prohibit the officer who might borrow school funds in violation of said section from continuing in office. The penalty provided by this section, if it should be held as a penalty, is that the county officer who authorizes a loan in violation of the section is held responsible for the sum loaned with interest thereon. We are not holding in this opinion that an officer would be subject to removal for making a loan in violation of the section.

The case which you have submitted is one in which the borrower was not an officer at the time the loan was made and, therefore, would not come within the provisions of said Section 9244. In the case of State ex Inf. Mitchell, ex rel. Goodman v. Heath, 132 S. W. (2d) 1001, l. c. 1004, the Court announced the rule as to the construction which should be placed on such statutes in the following language:

> "* * * 'statutes imposing qualifications should receive a liberal construction in

> favor of the right of the people to exercise freedom of choice in the selection of officers.' 46 C. J. 937, Sec. 32. The Missouri decisions have given a liberal construction to this and similar sections prescribing requirements of eligibility to elective offices."

To prohibit a person from holding an elective office, who has the statutory qualifications for that office, because he has school moneys borrowed from the county, would be denying the people the right to exercise their freedom of choice in the selection of their officers and would be placing too strict a construction on said Section 9244.

CONCLUSION.

Therefore, it is the opinion of this Department that if the county judge elect possesses the qualifications prescribed by statute, the fact that he has a school fund loan placed on his property before he was elected would not disqualify him from assuming the duties of county judge, the office to which he has been elected.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

TWB:CP

CIRCUIT CLERKS: Deputy circuit clerks are appointed by the circuit clerk and approved by the circuit judge subject to discharge at any time.

December 17, 1940

12-30

FILED
63

Honorable Tom R. Moore
Circuit Judge-Elect
Ozark, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of December 11th, 1940, requesting an opinion from this department, which is as follows:

> "However, if not imposing on good nature, as Circuit Judge-Elect of this District, I would like for you to give me your reflection relative to the deputy hire in counties of the class of Christian, Stone, Taney, Ozark and Douglas, in the office of Circuit Clerk and Ex-Officio Recorder.
>
> "In 1933, as is shown by the Session Act of the Fifty-Seventh General Assembly, pages 369-372 inclusive, a question arose as to the compensation of a deputy or assistant Circuit Clerk and whether the same was governed by deputies and assistants in the County Clerk's Office, as reflected in Section 11811, on page 370 thereof; but I find in the Laws of 1937, page 445, that that Act was in part amended and certain Sections enacted in lieu thereof, one of them being Section 11786, on page 445 and 11812 on page 446.
>
> "The question that I would like to have your reflection on is this: Is there any limit to the amount that a Judge can fix as compensation for a

deputy circuit clerk? And, Is there any limit to the number of deputies that a circuit judge can designate? And, also, in case a person had been appointed for four years as Deputy Circuit Clerk of a County, but the Circuit Court, and the salary fixed at a given sum, could said court at a later date change such compensation? And by such last mentioned Sections, I find in the concluding portion thereof these words: 'The Clerk of the Circuit Court may at any time discharge any deputy or assistant and may regulate the time of his or her employment and the Circuit Court may at any time modify or rescind its order permitting an appointment to be made.'

"As a concrete illustration, some two years ago in Christian County, the Circuit Court designated certain parties as Deputy Circuit Clerks and fixed their compensation at so much per month; and in such appointment, as above, I have been informed, appointed them for the full four year term, but no where in such act do I find where after such appointment has been made, the Circuit Court has any authority to reduce the compensation allowed; and such appointment being made for four years, I would like to have your construction of that Section of the Statute or Laws under the Act of the Legislature of 1937."

Under Section 11812, R. S. Missouri 1929, the appointment of deputies was made by the circuit clerk approved by the circuit court. Section 11812 was amended by the Session Laws of 1933 at page 369, which required the approval of the appointment of deputy circuit clerks by the county court. This session law was amended by the Session Laws of 1937, page 446, to be known as Sec-

tion 11812. This section reads as follows:

> "Every Clerk of a Circuit Court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the County Clerk. The Clerk of the Circuit Court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

It will be noticed under the above section that the approval of the deputy circuit clerks must be made by the circuit court which may consist of one judge or more than one judge. It will also be noticed that the clerk of the circuit court who makes the appointment may at any time discharge any deputy and may regulate the time of his or her employment. It further states that the circuit court, meaning the judge or judges, may modify or rescind its orders permitting an appointment to be made. The language in the above section is unambiguous and permits the clerk of the circuit court and the judge of the circuit court to discharge a deputy circuit clerk at any time. The term "approved by the circuit court" was construed in the case of Butler v.

Sullivan, 108 Mo. 630, l. c. 638. In that case the statutes gave the county clerk the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case at l. c. 638, said:

> "The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

The city ordinance of the City of Jefferson provides that when a vacancy exists or shall occur in the regular police force of this city, it shall be the duty of the marshal, with the advice and consent of a majority of the members elected to the city council, to appoint some suitable and competent person to fill such vacancy. In the case of Schulte v. City of Jefferson, 273 S. W., l. c. 170, the marshal of said city appointed the plaintiff a regular city policeman, but the city council refused to confirm said appointment. Plaintiff brought suit against the city to recover salary alleged to be due from defendant for performing the services of a police officer. The court, l. c. 172, said:

> "It is well settled--
>
> "'Where the appointment is made as

> the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; Meachem's Public Office and Officers, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84.
>
> "Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St. Louis, 183 Mo. 25, 39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Sec. 517."

Although the 1937 Session Laws, page 446, provide that the circuit clerk shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge or judges of the circuit court, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office, yet the circuit clerk is limited in the appointment of his deputies by the County Budget Act of 1933, page 340, and Session Laws of 1939, page 656, Missouri Statutes Annotated, Par. 12126a, page 6433.

There is no question but that where the power of appointment is given to any specific officer and the power is silent as to the full term of the appointment of deputies made by a specific officer, it is implied that the power of discharge would be lawful. In the case of Horstman v. Adamson, 101 Mo. App. 119, l. c. 124, the

court said:

> "* * * * The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own. * * * * * * * * * * * "

Also, in the case of State v. Hedrick, 241 S. W. 402, l. c. 416, the court said:

> "If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or the assignment of reasons. Throop on Public Officers, section 354; Mechem's Public Officers, section 445. The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his

own'; i. e. he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this state. In State ex rel. Campbell v. Police Commissioners, 14 Mo. App. loc. cit. 302, it was said:

"'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.'"

Also, in that case at page 418, the court said:

"It is also held in several decisions that if the Legislature is empowered to create an office, it may provide for removal from that office as it wills. 'In creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it.' In re Carter, 141 Cal. loc. cit. 320, 74 Pac. 998; State v. Houston, 94 Neb. loc. cit. 453, 143 N. W. 796, 50 L. R. A. (N. S.) 227. Even in case a 'Constitution creates an office but makes no provision for the period of its term or method of removal from it, the power of the Legislature to act in the public interest in these respects is well settled.' Op. of Justices, 117 Mass. 603; Wales v. Belcher, 3 Pick. (Mass.) 508; Op. of Justices, 216 Mass. loc. cit. 606, 104 N. E. 847.

"In case the Legislature is invested with 'power to provide the mode of filling, fix the term and prescribe the duties of such officers, it necessarily follows it may, in its discretion, not only discontinue them altogether, but determine the manner and by what tribunal an incumbent may be removed.' * * * * * * * * * * "

CONCLUSION

In view of the above authorities it is the opinion of this department that the appointment of a deputy circuit clerk by the circuit clerk for any term can be countermanded and the deputy circuit clerk discharged without reason.

It is further the opinion of this department that where the judge of a circuit courtmakes an order approving any appointment of a deputy made by the circuit clerk, the judge of the circuit court, even if he should be a newly elected officer as the judge of the circuit court, may at any time modify or rescind the order of the "circuit court" permitting an appointment to be made.

It is further the opinion of this department that since the Legislature did not see fit to place a limitation on the number of circuit clerks to be appointed and approved by the circuit court or the amount of compensation to be allowed by the circuit clerk, it is then in the discretion of the circuit clerk as to the number of deputies and the compensation which must be approved by the judge, or judges, of the circuit court. The compensation and the number of deputies, of course, must come within the County Budget Act of 1933 and 1939.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

TAXATION: Part of cemetery tract that is used for caretakers house is not taxable.

6-7

June 6, 1940

FILED
66

Hon. Martin L. Neaf
Assessor, St. Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of May 14, 1940, involving whether or not a portion of Salem Cemetery was exempt from taxation while owned by the Cemetery Society. It appears, from the information furnished us, that in 1853 the Trustees of the Salem Methodist Episcopal Church acquired four acres of land, at what is now 6800 Natural Bridge Road, and set the same aside for use as a burial ground. Three acres of this tract has been used throughout the years for interment of the dead. One acre of this tract has been occupied by the home of the caretaker. On December 1, 1939, the trustees of the Cemetery Society sold the one acre on which stood the caretaker's house and the purchaser has retained a portion of the purchase price until such time as it may be ascertained whether this one acre was exempt from taxation during the years it was owned by the Cemetery Society.

Section 6, Article 10 of the Missouri Constitution provides:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation."

This provision of the Constitution as it relates to cemeteries has been before the courts of the state only three times.

Bunk

It was before the court in State ex rel. v. Casey, 210 Mo. 235, 251, where this construction was placed upon it:

> "In that section the words, 'the property, real and personal, of the State, counties and other municipal corporations,' are separate from and have no connection with the words 'and cemeteries,' which follow. The exemption extends to 'cemeteries' as such, * * * *."

State ex rel. v. Wesleyan Cemetery Association, 11 Mo. App. 561, held that land used as a cemetery for many years and in use as such at the time the taxes were assessed and sued for was exempt from taxation. No facts were disclosed in that case which make it comparable to our question.

National Cemetery Association v. Benson, 129 S. W. (2d) 842 (Mo. Sup.) is a case somewhat similar to the instant case. In that case a business and manufacturing corporation, the plaintiff, conveyed to the Valhalla Cemetery Association, a non-profit association organized for the purpose of maintaining a cemetery, the gates and fences, hedges, avenues, driveways, walks, trees and other improvements in a 194 acre tract intended for a cemetery tract and retained title to unplatted portion of the tract. The title was to remain thusly until nine-tenths of the area was sold as burial lots, then the whole would pass to the cemetery association. Sales by plaintiff for non-burial purposes eventually reduced the area to 153 acres. Of this amount 65 acres was unplatted and no burial had been made in this unplatted portion. It was this 65 acres that was assessed for taxation purposes. The court, in the opinion, approved the construction placed on Section 6, Article 10 in State ex rel. v. Casey, supra, and said, l. c. 844:

> "We must determine therefore what is included under the word 'cemetery.' A cemetery has been defined to be: 'A place or ground set apart for the burial of the dead, orig. a Roman catacomb, later the consecrated yard of a

> church so used, now any burial ground, esp. on a large scale; a graveyard; a necropolis.' (Webster's New International Dictionary, 2d Ed.) 'A cemetery is a place set apart, either by municipal authority or private enterprise, for the interment of the dead.' (10 Amer. Juris., Cemeteries, Sec. 2, p. 487.) To invoke the exemption the property must have been 'set apart' for the burial of the dead. We are not concerned with that part of the land used for avenues, drives and walks which are appurtenances necessary to the use and enjoyment of the lot-owners.
>
> "We do not find a dedication either by estoppel or acts in pais for burial purposes. The land, except the Bernice Place lots, was not even platted into burial lots. The plaintiff corporation, a manufacturing and business corporation, has retained and now holds title to all the tract which has not been already sold as burial lots with the exception of the walks and drives. By the agreements with the association it recites a 'contemplation' of filing 'additional plats showing extensions and enlargements of said cemetery' but in no way binds itself to do so or to enlarge the cemetery."

The court held said property taxable, saying, l. c. 845:

> "* * * We can find nothing in the record to show that the land assessed here has either been used as a cemetery or that active measures have been taken toward preparing it for cemetery purposes."

The decision of the court in that case is of little use in deciding the instant question because the facts are so dissimilar, but it is useful in that several unstated principles of law may be inferred from the

language used which do materially assist us in deciding our question.

It will be noted the court stated: "We are not concerned with that part of the land used for avenues, drives and walks which are appurtenances necessary to the use and enjoyment of the lot-owners." Why was not the court concerned with these? We think the reason to be, that appurtenances necessary to the use and enjoyment of the lot-owners are not taxable even though not used, and never intended to be used, for interment of the dead.

That was the rule applied by the Supreme Court of Wisconsin in Town of Blooming Grove v. Roselawn Memorial Park Co., 286 N. W. 43, where the court, on a similar question, stated, l. c. 45:

> "In 10 Amer. Jur. at page 487, the word, 'cemetery', is thus defined: 'A cemetery is a place set apart, either by municipal authority or private enterprise, for the interment of the dead. The term includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes.'
>
> *
>
> "Black, H. C., Law Dictionary, Third Edition, 1933, page 295, defines a cemetery as: 'a place set apart for the interment of the dead, the term including not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes.' For same definition, see: Bouvier, Law Dictionary, Rawle's Third Rev., Vol. I, page 438, Words and Phrases, Fourth Series, Vol. I, page 372."

The same rule was applied in Texas in Ex parte Adlof, 215 S. W. 222, where it is stated, l. c. 223:

> "* * * We believe the following definition applicable to both, it may be said: 'A cemetery is a place set apart either by municipal authority or private enterprise for the interment of the dead. The term includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes.'"

Note also that the Supreme Court in the Benson case (129 S. W. (2d) l.c. 845) stated with respect to the failure of proof, that no 'active measures have been taken toward preparing it for cemetery purposes.' We take it, from this statement, that had the evidence shown that steps had been taken toward preparing the unplatted 65 acres for cemetery purposes the conclusion of the court would have been the reverse of what it was.

From this we infer the rule to be that land prepared for cemetery purposes, although no burials have been made therein, is tax exempt. Now a cemetery purpose, as above pointed out, includes all 'appurtenances necessary to the use and enjoyment of the lot-owners,' as well as burial lots.

Thus, our question seems to be: Is a caretaker, his quarters and office, an appurtenance necessary to the use and enjoyment of the lot-owners.

In State v. Lakewood Cemetery Association, 101 N. W. 161 (Minn.) "public burying-grounds" are exempted from taxation. It was contended in part that maintenance of a greenhouse by the cemetery association was not for a cemetery purpose. The court said, l. c. 163:

> "The use of a small portion thereof for a greenhouse for the purpose of growing flowers and plants to be used in beautifying the grounds, clearly, in our judgment, falls within the authority conferred upon appellant. It is a matter of common knowledge that greenhouses are maintained by many of the large cemetery

> associations throughout the country, and the sale of a small amount of the surplus stock is but an incident to the general management."

We think maintenance of a caretaker's house on a cemetery plot is such a purpose that is incidental to the proper use and enjoyment of the cemetery by the lot-owners and as such it is for cemetery purposes.

A somewhat analogous situation is the exemption extended to the lands of a limited acreage used exclusively for schools. It was held that such lands were exempt even though instructors and their families resided in the school property. The court reasoned, "If the incidental use (in this instance residing in the building) does not interrupt the exclusive occupation of the building for school purposes, but dovetails into or rounds out those purposes, then there could fairly be said to be left an exclusive use in the school on which the law lays hold." State ex rel. v. Johnston, 214 Mo. l. c. 663.

It appears to us that proper provision of a caretaker for the maintenance and upkeep of a cemetery dovetails into and rounds out the original purpose - the interment of the dead - and is necessarily incidental to such purpose. That this could best be done by having a caretaker on the premises will not be disputed. If the use of part of a school building for the residence of instructors does not cause said building not to be exclusively used as a school, then by the same reasoning, the use of a part of a tract of land for the caretaker does not cause said tract not to be used for cemetery purposes.

In reaching this conclusion we are aware of the holding in State v. Lange, 16 Mo. App. 468, but we do not think it decisive of our question for the reason that said decision involves the grant of tax exemption in a Legislative charter and the fact that the supposed caretaker there paid an annual rental for the premises and raised produce on the land, which he sold on the market. The court held this plot was used for the purposes of husbandry and not for cemetery purposes. Such is not the case before us.

Therefore, it is our opinion that the one acre tract, while owned by the Cemetery Society was used for cemetery purposes and as such was tax exempt.

We are returning herewith the deeds and certified copies of deeds, which you forwarded with your request.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

LLB:CP

TAXATION: Personal property obtained by federal agency through foreclosure not exempt from general property tax.

August 26, 1940

8-28

FILED
66

Honorable Martin L. Neaf
Assessor of St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of August 20, 1940, as follows:

> "I would like to have an opinion from your office as to whether or not personal property of the Federal Housing Administration is taxable.
>
> The Federal Housing Administration had to take over the Manhassett Village and Lucas-Hunt Village together with personal property, such as busses, automobiles, furniture, etc., located on these properties.
>
> Mr. Minard T. McCarthy, Zone Manager of the Federal Housing Administration agrees that the real estate is taxable but thinks the personal property is not.
>
> I am enclosing herewith copy of the letter of Mr. McCarthy on this question, copy of opinion from Mr. John H. Hendren of the legal department of the State Auditor's Office, with reference to sales tax, and also a copy of the National Housing Act as amended."

The only exemptions found in our laws which might bear on the situation presented are Section 1 of Article XIV, of the Missouri Constitution, which relates solely

to real estate owned by the United States, and Section 9743 of the Revised Statutes of Missouri for 1929, the pertinent part of which is as follows:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; * * * "

This statute cannot be applied in the present situation because the buildings in Manhassett Village are not public buildings, having been acquired through foreclosure and consisting entirely of private apartment houses.

We next resort to the National Housing Act, which created the Federal Housing Administration, for any expression by Congress on the question at hand. The following are all the provisions of the Act which we are able to find with regard to taxation by the various states of the property of the Federal Housing Administration:

Under Section 207 of the National Housing Act, in paragraph i, we find:

> " * * * Such debentures as are issued in exchange for mortgages insured after the date of enactment of the National Housing Act Amendments of 1938 shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. * * *

> * * * The Administrator at any sale under foreclosure may, in his discretion, for the protection of the Housing Fund, bid any sum up to but not in excess of the total unpaid indebtedness secured by the mortgage, plus taxes, insurance, foreclosure costs, fees, and other expenses, and may become the purchaser of the property at such sale. * * * "

Section 208 of the same title is as follows:

> "Nothing in this title shall be construed to exempt any real property acquired and held by the Administrator under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Section 307 of Title III of the Act is as follows:

> "All notes, bonds, debentures, or other obligations issued by any national mortgage association shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. Every national mortgage association, including its franchise, capital, reserves, surplus, mortgage loans, income, and stock, shall be exempt from taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. Nothing herein shall be construed to exempt

> the real property of such association from taxation by any State, county, municipality, or local taxing authority to the same extent according to its value as other real property is taxed."

The effect of these provisions is to exempt all notes, bonds or other obligations issued by the Federal Housing Administration from taxation. While no mention is made of personal property owned by the Administration, the real estate is specifically subject to real estate taxes imposed by any state or political subdivision. It should be noted also that even the obligations of the Administration are subject to surtaxes, estate taxes, inheritance taxes and gift taxes.

We have made a lengthy search of the authorities, both state and federal, and have found a growing tendency on the part of the federal courts to restrict the immunity of federal agencies and instrumentalities from state taxation. A precedent of many years standing was overruled by the United States Supreme Court in Graves v. The People of the State of New York, 306 U. S. 466, 83 L. E. 927. In the opinion in that case, rendered by Justice Stone, we find the following, which bears on the question at hand (83 L. E. 932, 933):

> "Congress has declared in Section 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, 'including its franchise, its capital, reserves and surplus, and its loans and income,' is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the

Congressional intention is not to be gathered from the statute by implication. Cf. Baltimore Nat. Bank v. State Tax Commission, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417, supra.

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

Following the holding in this case, it is our conclusion that since a tax on personal property is neither permitted nor prohibited, no presumption as to the intent of Congress can arise either way.

A similar question arose in our own state, and was decided in State ex rel. Baumann v. Bowles, 115 S. W. (2d) 805. In the opinion by Judge Gantt, many authorities were reviewed, and we quote at length from the opinion (l. c. 806, 807):

> " * * * It is admitted that the decisions on the immunity of federal and state governmental instrumentalities from taxation are in confusion.
>
> However, the states may impose taxes on federal corporations created to carry out essential governmental functions. Union P. Railroad v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp., 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; U. S. v. Strang, 254 U. S. 491, 41 S. Ct. 165, 65 L. Ed. 368.
>
> They also may impose taxes on corporations utilized by the federal government to carry out essential governmental functions. Thomson v. Union Pacific R. Co., 9 Wall. 579, 19 L. Ed. 792; Baltimore Shipping & Dry Dock Co. v. Baltimore, 195 U. S. 375, 385, 25 S. Ct. 50, 49 L. Ed. 242; Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469, 78 L. Ed. 918.
>
> They also may impose taxes on agencies licensed, chartered, and supervised by the United States for the public benefit. Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622; Broad River Power Co. v.

Query, 288 U. S. 178, 53 S. Ct. 326, 77 L. Ed. 685; Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291, 51 S. Ct. 434, 75 L. Ed. 1042.

* * * * * * * * * * * * * * * * * * * *

In this connection it should be stated that the immunity of state instrumentalities from federal taxation, and the immunity of federal instrumentalities from state taxation is equal and reciprocal. Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, 71 A. L. R. 1260; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759; Ambrosini v. U. S., 187 U. S. 1, 7, 23 S. Ct. 1, 47 L. Ed. 49; Indian Motocycle v. U. S., 283 U. S. 570, 577, 51 S. Ct. 601, 603, 75 L. Ed. 1277; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443, 76 L. Ed. 815; U. S. v. California, 297 U. S. 175, 184, 56 S. Ct. 421, 424, 80 L. Ed. 567.

If the immunity of state and federal instrumentalities is equal, it would seem to follow, under the ruling in the South Carolina Case, supra, that a federal agency engaged 'in a business which is of a private nature' would not be immune from state taxation.

The rule with reference to immunity of federal instrumentalities from state taxation and immunity of state instrumentalities from federal taxation also is stated as follows:

'The very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal

government. * * *

'Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. * * *

'When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

'As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates thoseactivities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the state; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other.' Metcalf & Eddy v. Mitchell, 269 U. S. 514, loc. cit. 521, 525, 46 S. Ct. 172, 174, 70 L. Ed. 384.

Under this rule each case must be determined from its particular facts. In the instant case it is admitted that the four units of the Farm Credit Administration are federal instrumentalities created for a public purpose. Even so, the business of said units is of a private nature. Furthermore, the activities of the Farm Credit Administration are not traditional federal government activities. Indeed, the Supreme Court of the United States, on a consideration of the federal legislation in question, stated as follows:

'It is to be borne in mind that federal land banks, although concededly federal instrumentalities, possess also some of the characteristics of private business corporation. See Federal Land Bank v. Gaines, supra, 290 U. S. 247, 254, 54 S. Ct. 168, 78 L. Ed. 298. The statute does not contemplate that their stock is to be wholly, or even chiefly, government owned. Its acquisition by private investors is permitted, * * * and its subscription by the borrowing national farm loan associations is compulsory. * * * The operations of the federal land banks are, in part at least, for profit. * * * In the conduct of their business they may enter into contracts, * * * borrow money, receive interest and fees, * * * pay the expenses and commissions of agents, * * * and pay dividends on their stock. * * * While they are required to deposit in trust farm mortgages as security for farm loan bonds, * * * they may acquire and dispose of property in their own right, including land. * * * They thus have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose.' Federal Land Bank v. Priddy, 295 U. S. 229, loc. cit. 232, 233, 55 S. Ct. 705, 706, 79 L. Ed. 1408."

In brief, our court seems to apply the test as to whether or not the agency claiming exemption directly exercises the sovereign powers of the government. In the instant case, as in the case above, an admitted federal instrumentality is concerned. The Federal Housing Administration, as well as the Farm Credit Administration, was created for a public purpose. In both instances the business of the administrations is of a private nature. The Federal Housing Administration, through loans to private persons, assists in the erection of dwellings or, in some instances, insures mortgages already existing on privately owned real estate. Either of these functions is that ordinarily carried on by private individuals or institutions, and cannot be said in any sense to be an exercise of the sovereign power of the federal government.

Because of default in a private loan in the instant case, they have taken over as mortgagee a large area of private apartment dwellings. Incident to the repossession, they have taken over, according to the facts given in your opinion request, a considerable amount of personal property, such as furniture with which these apartment dwellings were equipped and busses which had been used to convey the residents of this area to downtown St. Louis. The operation of these busses and the possession of this furniture cannot be said to be an exercise of any of the sovereign powers of government in a democracy. In fact, we fail to find any authority in the National Housing Act for the granting of a mortgage on either of the above classes of personal property or the control of same if ownership is obtained by the Federal Housing Administration.

Under the test laid down, therefore, in State ex rel. v. Bowles, supra, the personal property described in your request for an opinion is not exempt from taxation.

It is our conclusion, therefore, in the light of the foregoing authorities, and in the absence of any statute granting exemption, that the personal property of the Federal Housing Administration located in the Villages of Lucas-Hunt and Manhassett, and not used in the exercise of any of the governmental functions of said administration,

is subject to the general state property tax and the general property tax levied by any political subdivision within whose jurisdiction it is situated.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

ASSESSOR: County Assessor without authority to make an assessment of property ordinarily exempt from General Taxes which lies within an incorporated sewer district under the provisions of Laws Missouri 1933-34.

September 10, 1940

9-11

FILED
66

Mr. M. L. Neaf, Assessor
St. Louis County
Clayton, Missouri

Dear Mr. Neaf:

This is to acknowledge your letter of recent date, requesting an opinion from this department which reads as follows:

"In reply to your letter of the 21st beg to advise it is the contention of the Attorney for Webster Groves Sub-sewer District, the County Assessor must make all assessments under the general law. This attorney agrees there are some defects in the law, one of which is the omission of a provision for assessment of property not subject to general taxes.

"Under the General Tax Laws all property subject to taxation is assessed by the County Assessor and the valuation placed thereon after review by the County and State Boards of Equalization, is the value for all municipal corporations.

"Property exempt from general taxes has been placed on the Exemption List and is not and has not been certified to the County Clerk as has all other assessments.

"I would like to have an opinion from the Attorney General as to whether or not property exempt from General Taxes, but subject to special taxes, should be assessed by the County Assessor and if so to whom should the assessment be certified."

In accordance with your request we limit this opinion to whatever duty, if any, is imposed upon the County Assessor respecting the making of any assessments under the provisions of Laws of Missouri, extra session, 1933-34, at page 119.

As a general proposition of law:

"Under our system of taxation, there can be no lawful collection of a tax until there is a lawful assessment, and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose." (State ex rel. Kansas City Power & Light Company v. Smith, 111 S. W. (2d) 513.).

With this general proposition of law before us, we have examined in detail the sewer district act, Laws of Missouri 1933-34, extra session, supra, and have not found any provision whereby it is the duty of the County Assessor to assess property which is exempted from general taxes, but subject to special taxes.

This view is further supported by the court in the case of Normandy Consolidated School District v. Wellston Sewer District of St. Louis County, 77 S. W. (2d) 477, wherein the St. Louis Court of Appeals said, at page 478:

> "* *the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property shall be subject to the assessment. * * * * * * * ** * * if a clear expression of legislative intent is to be required as the basis for the enforcement of special tax bills against public property strictly devoted to public use, then mere general language in a statute will not suffice to warrant such assessment, and public property will not be held included within the scope of any such statute unless by express enactment or clear implication. * * * * * * * * * ."

Inasmuch as the sewer district act, supra, makes no provision for the assessment of property ordinarily exempt from general taxes, it seems to follow that the assessor is without authority to make an assessment. A similar proposition arose in connection with the assessment of additional income by the County Assessor received

by an individual during the year 1926, in the case of State ex rel. Ford v. Gehner, 27 S. W. (2d) 1. In that case the question before the court was whether or not any provisions existed in the income tax law respecting the assessment against the relator of taxes upon his additional income for the year 1926, and the court held that the assessor was without authority to make an assessment against the relator for additional income earned in 1926, or to certify the same to the collector for collection. This was because no statutes existed which permitted the assessor to make an additional assessment. It is believed that this case by analogy is authority for the proposition that the assessor is not required to make a valuation of property ordinarily exempt from general taxes but subject to special taxes.

It further appears from the Sewer District Act, supra, that Section 9 thereof is the exclusive section for the imposition of taxes upon property which abuts the sewer district. This section of the statutes reads as follows:

> "It shall be the duty of the Secretary of the Board of Trustees of the incorporated sewer district on or before the 15th day of May in each year to certify to the County Court of the county wherein such incorporated district is situate the amount of money that will be required during the next succeeding year to pay interest falling due on bonds issued and the principal of bonds maturing in such year, and the amount necessary to cover the estimated expenses of maintaining such sewer system in good condition and of maintaining the district corporation with its necessary expenses. On receipt of such certificate it shall be the duty of the County Court at the time it makes the levy for the state, county, school and other taxes to, by order made, levy such a

> rate of taxes upon all the taxable property in the said incorporated sewer district as will produce a sum of money sufficient for the purposes aforesaid; provided, that the County Court shall have no authority to levy such tax until the voters of said sewer district shall have voted to incur an indebtedness under the provisions of this Act. On such order being made it shall be the duty of the County Court to cause such rate of taxation to be extended upon the tax books against all the taxable property in said incorporated sewer district and the same shall be collected and remitted to the Board of Trustees of the said sewer district by the collector of the revenue of said county at the time, in the manner, and by the same means as state, county, school and other taxes are collected and remitted. All of the laws, rights and remedies provided by the laws of this state for the collection of state, county, school and other taxes, shall be applicable to the collection of taxes herein authorized to be collected. All taxes levied under this act shall be based upon the assessed valuation of lands and other property in the said incorporated sewer district in accordance with the current record of the assessed valuations of all taxable property within said incorporated sewer district as may be determined by the records in the assessor's office of the county and such tax shall be prorated and an equal amount levied upon each $100.00 of assessed valuation."

It is at once apparent from an analysis of this section, that it is the duty of the County Court to cause a return of taxes to be extended upon the tax books against all

taxable property in the incorporated sewer district. Also, that the taxes levied are to be based upon the valuation of lands and other property in the sewer district, in accordance with assessed valuations of all taxable property.

CONCLUSION

In view of the above it is the opinion of this department, since the law has failed to provide a means of assessment, that the County Assessor is without authority to value property ordinarily exempt from general taxes which lies within an incorporated sewer district.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RCS/rv

LIQUOR:
MONOPOLIES: Association of brewers cannot through agreement or concerted action refuse to sell beer to any dealer or group of dealers. Such an agreement would be in violation of the anti-trust laws.

February 9, 1940

2-14 FILED 67

Honorable C. Roy Noel, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Noel:

We have received your letter of February 6, which reads as follows:

> "As you probably know, Walker Pierce, my predecessor in office, has been engaged by the brewers of the state to aid the officers in the enforcement of the liquor law, and one of the methods by which they claim to be able to aid is by taking what they call a "shut-off" action in the sale of beer to law violators.
>
> Mr. Pierce has explained to me that it is the plan of the brewers to refuse to sell beer to any place found to be violating the law. He expresses some concern as to whether or not such action on the part of the brewers might be considered as violative of our restraining of trade statute.
>
> Will you please give me the benefit of your opinion concerning this action on the part of the brewers. I understand from Mr. Pierce that he has discussed this question with your assistants, Mr. Taylor and Mr. Allebach."

Under a similar state of facts, the Supreme Court of Missouri in the case of Reisenbichler vs. Marquette Cement Company et al, 108 S. W. (2nd) 343, recently passed on the propositions of law involved in your letter and also referred in the course of the opinion to the applicable statutes. In that case, the petition alleged that the plaintiff was engaged in the retail lumber business in Cape Girardeau, Missouri; that the several defendants were engaged also in the lumber business, some as wholesalers and others as retailers; that the plaintiff had, in the course of years, built up a profitable lumber business and for many years had sold cement and purchased it at wholesale from the defendants, Marquette Cement Company and Chris Stiver. The petition then alleged that all the defendants entered into an agreement, pool, and combination among themselves in restraint of trade and competition in the sale of cement; that in pursuance of such combination, pool and agreement, the defendants, Marquette Cement Company and Chris Stiver, refused to furnish, or sell, the plaintiff cement; that pursuant to said combination and agreement the defendants, Marquette Cement Company and Chris Stiver, regularly sold, and were still selling, cement to all retail dealers dealing in that commodity in Cape Girardeau except the plaintiff. The plaintiff then charged that, as a result of this combination and agreement between the defendants, he was unable to obtain cement for his retail trade as cheaply as his competitors; that plaintiff had been compelled, by reason of said unlawful combination and agreement, to purchase cement for his retail trade from a competitor at an advanced price and at a price in excess of that charged by the Marquette Cement Company; that by reason of said unlawful agreement, the plaintiff's cement business had been destroyed. The lower court sustained a demurrer to the petition, whereupon the plaintiff appealed. In reversing the case and remanding the cause for trial, the Supreme Court said, l.c. 344:

> "We are of the opinion that the first, second, fourth, and fifth points made in respondents' brief are without merit. The petition described the agreement alleged to have been entered into between the defendants. It also stated its purpose and effect. It is charged

in the petition that the defendants entered into a combination, the effect and purpose of which was: That the defendant Marquette Cement Company would sell cement to all of the retail dealers in the city of Cape Girardeau, who were named as defendants in the petition, but that no cement would be sold to the plaintiff, who was also a retail dealer in cement in said city. Section 8700 (Mo. St. Ann. Sec. 8700, p. 6486) reads as follows:

'Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article.'

We are of the opinion that the petition stated facts sufficient to constitute a cause of action under section 8700, supra. It will, therefore, not be necessary to discuss the question of whether the petition is sufficient under the other sections mentioned. It is evident, from a reading of the sections of article 1, chapter 47 (Mo. St. Ann. Sec. 8700 et seq., p. 6486 et seq.), that the Legislature intended to, and did, prohibit any and every form of combination or agreement that may be conceived, that tends to hinder or restrain competition and trade in any product or commodity. By the agreement described in the petition the defendants agree, among themselves, that plaintiff should be hindered in his business of buying and selling

cement, thereby limiting competition. In Heim Brewing Co. v. Belinder, 97 Mo. App. 64, loc. cit. 69, 71 S. W. 691, 692, the Kansas City Court of Appeals said:

'Any one may exercise a choice as to whom he will sell his goods, but he can not enter into a contract whereby he binds himself not to sell, for in such instance he barters away his right of choice, and destroys the very right he claims the privilege of exercising. After entering upon such agreement, he is no longer a free agent.'

This court in Dietrich v. Cape Brewery & Ice Co., 315 Mo. 507, 286 S. W. 38, loc. cit. 43 (14), approved the ruling of the Court of Appeals. Note what this court said:

'Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independant action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder. Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691; State ex rel. v. People's Ice Co., 246 Mo. (168) 221, 151 S. W. 101; State ex inf. v. Armour Packing

Co., 265 Mo. (121) 148, 176 S. W. 382.'

The Legislature has declared all such agreements illegal. Defendants in such a case will not be heard to say that the agreement was not injurious to the public. This court has so ruled. See State ex rel. Barrett v. Boeckeler Lumber Co., 301 Mo. 445, loc. cit. 524, 525, 256 S. W. 175 (en banc); State ex inf. Major v. Arkansas Lumber Co., 260 Mo. 212, loc. cit. 315, 169 S. W. 145."

Under the federal law, the rule appears to be the same. In the recent case of U. S. vs. Ethyl Gasoline Corporation 27 Fed. Supp. 959, decided May 19, 1939, the District Court for the Southern District of New York said, l.c. 965:

"The Ethyl Gasoline Corporation has entered into license agreements with approximately 123 refiners, who together refine and sell about 88% of all the gasoline sold in the United States. These include all except one of the major refiners in this country. Each of the refiner license agreements provides that lead-treated gasoline may be sold to those jobbers only who are licensed by the defendant corporation and this provision is almost invariably complied with by the refiner licensees. Since the defendants have denied numerous applications for jobber licenses, many persons desiring to engage as jobbers in the sale of lead-treated gasoline, which comprises about 70% of all the gasoline manufactured and sold in the United States, have been excluded from the market. The unsatisfactory 'business ethics' of the jobbers has been the principal reason for such exclusion.

This provision of the refiner license agreements clearly is in restraint of trade. Each agreement calls for cooperative action between the defendant corporation and its refiner licensee in the exclusion of unlicensed jobbers from the market. While a manufacturer or trader may refuse to deal with those who do not observe the resale prices suggested by him, he may not combine or enter into agreements with intermediate distributors to cut off the supplies of such dealers. Victor Talking Machine Co. v. Kemeny, 3 Cir., 271 F. 810; Straus v. Victor Talking Machine Co., 2 Cir., 297 F. 791; cf. Federal Trade Commission v. Beech Nut Packing Co., supra."

CONCLUSION

We conclude, therefore, that the brewers cannot agree among themselves or combine in any way by agreement to refuse to sell beer to any one person or group of persons. Any one of the brewers belonging to the association can, of course, sell to whomsoever he pleases, or refuse to sell to anyone. However, any such action cannot lawfully be taken as a result of an agreement or contract or concerted action with other brewers. No brewer can enter into a contract whereby he binds himself not to sell.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RT

LIQUOR: Liquor Control Act contains no provisions for service of process against foreign
CORPORATIONS: brewing corporations.

May 2, 1940

5-6

FILED
67

Honorable C. Roy Noel, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your letter of April 23, which reads as follows:

"We are this day in receipt of a letter from the Honorable Roy Hamlin, Hannibal, Missouri, requesting information, which we ourselves are unable to give, in regard to legal service on a non-resident permittee. It has been our understanding that any designated dealer in the product of said permittee was the agent of this concern through whom legal service could be had. Mr. Hamlin's letter reads:

'Your letter of April 19th received this morning and in response thereto please be advised that the situation I have that I was talking to you about is as follows: I have brought a civil suit under the liquor laws against the Dick Brothers Brewing Company of Quincy, Illinois. I have procured service upon them by serving their local representative, Mr. Titus. The brewing company has now come in and entered a special appearance and filed an affidavit to the effect that they have no agent in the State of Missouri and never have had, and service on Titus is null, void and of no effect, and not binding upon them.

'This is the situation as I understand it.

Mr. Titus is the only agent they have in and around Hannibal. He handles their beer, he advertises their beer, he takes orders for delivery of their beer, and he collects for it and he is known as a distributor. He says what he does is that he goes to Quincy, Illinois, and buys the beer directly from the Dick Bros. Brewing Company and then he sells it and makes a commission. However, they have no other representative here and on his truck he has "Dick Bros. Brewing Company, Quincy, Illinois."

'Unless I am able to get service on this company in this way, I know of no other way I can get service and I know that was not the intention of our laws, because if we are unable to get service on non-resident brewers in Missouri for wrongs done in the State of Missouri, we ought to know it at once and amend the present law.

'I wish you would get an opinion from the Attorney General on this matter, as to whether or not our present law is sufficient to get service on non-resident brewers in the manner stated hereinabove.

If not, ask them to make any suggestions they can as to how it can be done.'

"We would like to have your opinion as to how this department, if the time should arise, might obtain legal service on a non-resident licensee for a violation of the Liquor Control Act."

It is apparent from your letter that the matter about which you inquire is now pending before a court of competent jurisdiction. Therefore, we should make no comment on the particular matter as to whether or not Mr. Titus is an agent of the Dick Bros. Brewing Company of Quincy, Illinois. He may or may not be. That is a question of fact.

There is nothing in the Liquor Control Act itself which in any way mentions or deals with the service of process on foreign liquor corporations licensed to do business by the Supervisor of Liquor Control. The legislature has seen fit to authorize service of proceds by serving certain state officers in connection with other types of foreign companies doing business in this state, but there are no similar laws dealing particularly with liquor corporations. For instance, section 5614 of the Missouri Laws, L. of Mo. 1931, page 158 requires the following of foreign building and loan associations, doing business in Missouri, this section reads in part as follows:

> "Third.--It shall also file in the said bureau a written instrument, duly executed, agreeing that a summons may issue against it from any county or city in this state, directed to the sheriff of the county or city in which the office of the supervisor of building and loan associations is situated, commanding him to serve the same by certified copy personally upon the said supervisor, or by leaving a copy thereof at his office. The said supervisor shall, however, mail a copy of any papers served upon him, postage prepaid, to the home office of such association."

Section 5894, Laws of Missouri, 1939, p. 451, similarly provides for service of process on foreign insurance companies by serving the Superintendent of Insurance. However, the legislature has never passed a similar statute in connection with foreign liquor corporations.

We find, however, that a corporation known as the Dick & Brothers Quincy Brewery Co., of Quincy, Illinois, is now authorized to do business in Missouri by the Secretary of State. We also find that the last two anti-trust affidavits filed with the Secretary of State for this Corporation were filed by the "Dick Bros., Brewery Co." of Quincy, Illinois. We have also been informed by the office of the Supervisor of Liquor Control that the name of the Dick & Brothers Quincy Brewery Co., was changed in the month of May, 1937, and it has been since that time, and is now, known as the Dick Bros. Brewing Co. While the records of the Secretary of State do not show this change, yet this appears, from the information received, to be a fact. The Supervisor's office also advises us that the "Dick Bros. Brewing Co." of Quincy, Illinois is now licensed to solicit and sell beer to wholesalers in the state of Missouri.

As is required by law, the Dick & Bros., Quincy Brewery Co., (which as stated above, now appears to be the Dick Bros. Brewing Company) filed with the Secretary of State the name of George L. Gisler, 960 Mulberry Street, Kansas City, Missouri, as its resident agent upon whom pro-

cess might be served. Another address contained in its files shows Gisler's address as 906 Commerce Building, Kansas City, Missouri. Service of process can undoubtedly be had upon him, if he can be found. If Gisler cannot be found and a non est return is made, service can be had under such circumstances by serving the Secretary of State. This procedure is provided for in Section 4598, Laws of Missouri, 1937, page 204.

Section 723, R. S. Missouri, 1929, provides as follows:

> "Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."

In State ex rel v. Jones, 270 Mo. 230, the court held that the word "corporation", as used in the above section, comprehends foreign as well as domestic corporations. Therefore, if the cause of action accrued in Cole County, for instance, the Circuit Court of Cole County would have jurisdiction and service of process could be had by serving the appointed agent in Jackson County.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

JFA:RW

DEAD HUMAN BODIES:
CORNORER: (1) Duty of coroner having custody of dead body found floating in stream or river, to notify secretary of anatomical board as to disposition; (2) If unfit for anatomical purposes, may direct coroner to dispose of same by burial; (3) Must exercise reasonable discretion as to place of burial; (4) Coroner obligated to pay undertaker.

September 7, 1940

FILED
FILED 67
67

Mr. John F. Nunnelee, Jr.
Coroner
Scott County
Charleston, Missouri

Dear Sir:

We are in receipt of your letter of September 3d, wherein you state as follows:

> "I am writing you in the hope of obtaining information as to the disposition of human bodies found floating in streams and rivers in Missouri.
>
> "What is the law regarding the burial of these cases, and where by law shall burial be made? By whom? Under whose supervision and instruction?
>
> "Is it lawful to dispose of these bodies by the burial being made on the bank of the stream where they are found?
>
> "Is it the duty of the County Court to pay costs for burial of these bodies to the Undertaker that has been instructed by the County Coroner to so dispose of body?"

In response to your inquiry as to the disposition of human bodies found floating in the streams and rivers in

Missouri, we are enclosing copy of an opinion rendered by this Department under date of December 16, 1936, to Dr. Louis H. Padberg, Coroner, St. Louis, Missouri, wherein the following conclusion was reached.

> "We, therefore, rule that coroners are charged with the duty of notifying the secretary of the Missouri Anatomical Board whenever they have in their custody the body of any deceased person required to be buried at public expense."

Said conclusion was bottomed upon Section 9129, R.S.Mo. 1929, which reads as follows:

> "Superintendents or wardens of penitentiaries, houses of correction and bridewells, of hospitals, insane asylums and poorhouses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers in whose custody the body of any deceased person, required to be buried at public expense, shall be and are hereby required immediately to notify the secretary of the board of distribution, whenever any such body or bodies come to his or their possession, charge or control, and shall thereafter dispose of such body or bodies, as the secretary of the state board may direct: Provided, that at any time before said body or bodies have actually been distributed, as provided in this article, any relative or friend of any such deceased person or persons, shall have the right to take and receive the same from the possession of any person in whose charge or custody it may be found, for the purpose of interment: Provided, that when a claim

> is made for such body or bodies by any person, not a relative of such deceased person or person, the expense of the interment shall be borne by the person making such claim. The school or college securing such body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to secretary, which notice shall be by telegraph, when necessary. A correct record of all such bodies, name and date of death, shall be kept in a book kept for that purpose with the county clerk of the county in which such person died, or the city health commissioner of St. Louis city, and such record must be furnished said county officer by person or persons reporting said bodies to the state anatomical board."

Section 9129, supra, has been repealed and in its place we have Section 4, Laws of Missouri, 1939, page 512, which reads as follows:

> "Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poor houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the Board, or the person duly designated by the Board or by its secretary to receive such notice, whenever any such body or bodies come into his or their custody, charge or control, and shall, without fee

or reward, deliver, within a period not to exceed thirty-six (36) hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the Board and permit the Board or its agent or agents to take and remove all such bodies, or otherwise dispose of them: Provided that each educational institution receiving a body from the Board shall hold such body for at least thirty (30) days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment. Each educational institution securing a dead body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to the secretary of the Board of his agent, which notice shall be by telegraph, when necessary to insure immediate notice. A correct record of all such bodies, including the name and date of death, shall be kept in a book provided for that purpose by the county clerk of the county in which such person died, and by the city Health Commissioner of the City of St. Louis, and such record shall be promptly furnished said officer by theperson or persons reporting said bodies to the secretary of the Board or his agent. Whenever any person fails to give the notice and deliver the body

> of a deceased person as required by this act, and by reason of such failure such body shall become unfit for anatomical purposes, and is so certified by the duly authorized officer or agent of the Board, such body shall be buried at the expense of the person so failing to notify and deliver such body."

It is thus evident that it is still the duty of coroners having the custody of the body of any deceased person required to be buried at public expense, to immediately notify the secretary of the anatomical board and deliver such body into the custody of the board.

Section 6, Laws of Missouri, 1939, page 513, provides in part that, "bodies required to be buried at public expense shall be under the exclusive custody and control of the board."

It is probably very likely that when the anatomical board is notified by the coroner of the custody of such a body as referred to in your letter, that they will advise the coroner that such body is not desirable because it has become unfit for anatomical purposes. They will in all likelihood direct that the body be disposed of by burial.

You then ask whether it is lawful to dispose of these bodies by the burial being made on the bank of the stream where they are found??

We find no statute declaring where such a body may be buried, provided it is not desired by the anatomical board. Section 11626, R.S.Mo. 1929, provides as follows:

> "Whenever an inquest shall be held, if there be no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it is to attend to such burial, the coroner shall procure a cheap, plain coffin, and cause

> a grave to be dug and the body to be conveyed thereto and buried. It shall be the duty of the coroner, in so doing, to avoid all unnecessary expense, and to render to the court an accurate statement of all money expended by him for such purpose; and the county court shall make to him a reasonable allowance for his actual expenses in procuring the coffin, hauling the body to the grave, digging the grave and burying the body; and also a reasonable allowance, according to the circumstances, for his own time and services in attending to such preparations and burial."

Furthermore, we find no statute authorizing the county court to pay costs for burial of these bodies to the undertaker that is instructed by the county coroner to dispose of the bodies. We do not intend by this statement to mean that thecoroner may not employ an undertaker to bury the body. We are merely referring to the person authorized to be paid by the county court. The county may only pay the coroner for the burial, which must be in accord with the manner prescribed by statute, and the coroner then is personally obligated to the undertaker for whatever services he contracts.

From the foregoing we are of the opinion (1) that it is the duty of coroners having the custody of the body of any deceased person found floating in the streams and rivers in Missouri, required to be buried at public expense, to immediately notify the secretary of the anatomical board for instructions as to the disposition of the body. (2) If the board does not desire said body because it is unfit for anatomical purposes, or for any other reason, it may direct the coroner to dispose of same by burial. (3) If ordered disposed of by burial the coroner should exercise a reasonable discretion as to the place of burial. (4) It is not the

duty of the county court to pay the costs for burial of the body to the undertaker who has been authorized by the county coroner to dispose of the body, but the county court's obligation for costs for burial of the body is to the coroner who in turn is personally obligated to pay the undertaker for services he contracted.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

INTOXICATING LIQUOR: Brewers and wholesalers giving money and property to retail dealers for bottle tops redeemed violate Section 3 and Section 13139-z-14.

December 2, 1940

12-5

FILED
67

Honorable C. Roy Noel, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated November 28, 1940, which is in the following terms:

> "Certain brewers and wholesalers of intoxicating liquor and non-intoxicating beer are employing a practice in St. Louis which appears to be a violation of the Liquor Control Act of the State of Missouri.
>
> Company A employs the following described practice: Persons in possession of bottle caps or tops removed from bottles of Company A's beer, which caps bear the name or trade-mark of Company A, take said tops to a department store, which acts as a cap redemption station, and there in return for each two bottle tops or caps redeemed, receive one trading stamp. The stamps are pasted in a booklet made and distributed for that purpose. When the booklet is filled with 1,000 such stamps, the stamps are exchanged for merchandise or cash. The minimum number of stamps redeemable is 1,000. That number of stamps represents a purchasing power of $2.50, that is, at various mercantile establishments which cooperate in this program, 1,000 such stamps are exchanged for $2.50 worth of merchandise,

or for $2.00 in cash. Said Company A uses the advertising slogan, "Its the Tops".

Company B employs the following described practice: Persons in possession of bottle tops or caps removed from bottles of Company B's beer, which caps bear the name or trade-mark of Company B, take said caps to various mercantile establishments, which act as cap redemption stations and there in return for each 200 caps redeemed receive 25¢ in cash. The minimum number of caps redeemable is 200. Said Company B uses the advertising slogan, "Caps Off to Quality".

Each company advertises its practice, either by posters displayed in establishments licensed to sell by the drink intoxicating liquor or non-intoxicating beer, by small cards, by newspaper advertising, or by all of these methods. The two companies here considered act through the trading stamp company, advertising firms and various individual mercantile establishments.

Please give me your official opinion on the following question: Where wholesalers or brewers of intoxicating liquor or non-intoxicating beer, directly or indirectly through their agents, give money or merchandise to a retail dealer in the sale of intoxicating liquor or non-intoxicating beer, in return for bottle tops or caps redeemed in the manner above described directly or indirectly by said retail dealer --does that constitute a violation of the Liquor Control Act of the State of Missouri?"

"Intoxicating liquor" is defined in Section 17 of the

Liquor Control Act (Laws of Missouri Ex. Sess. 1933-34, page 83, Mo. St. Ann. page 4689, Section 4525g-19) as "alcohol for beverage purposes . . . fermented, malt, or other liquors . . . containing in excess of 3.2% of alcohol by weight."

"Non-intoxicating beer" is defined in Section 13139-z-2 of the said Act (Laws of Missouri 1933-R, page 265, Mo. St. Ann. page 4166, Section 13139-z-2) as "beer . . . having an alcoholic content of more than one-half of one per cent by volume and not exceeding 3.2% by weight."

The use of trading stamps in an ordinary mercantile business other than the liquor traffic is not prohibited by any Missouri statute and is not inherently illegal. In 24 American Jurisprudence, page 474, Section 101, it is said:

> "While there is a diversity of opinion, the weight of authority supports the view that trading stamp schemes are not gift enterprises, within the purview of statutes or ordinances relating to such enterprises, inasmuch as the chance element does not enter into such schemes; and especially is this view strengthened where the term is used in connection with the word 'lottery' or 'lotteries,' both of which, as all the courts agree, are terms involving the element of chance or hazard." (See also annotations at 26 A.L.R. 724, 707; 39 A.L.R. 1036; 124 A.L.R. 345.)

But Section 3 of the Liquor Control Act (Laws of Missouri 1939, page 820, Mo. St. Ann. page 4689, Section 4525g-3) dealing with intoxicating liquor, provides:

> "Distillers, wholesalers, wine makers, brewers or their employees, officers or agents, shall not, under any circumstances, directly or indirectly, have any finan-

cial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers. Any distiller, wholesaler, wine maker or brewer who shall violate the above provisions of this section, or permit his employees, officers or agents to do so, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as follows: For the first offense, by a fine of One Thousand Dollars ($1000.00); for a second offense, by a fine of Five Thousand Dollars ($5000.00); and for a third offense, the license of said person shall be revoked. All contracts entered into between distillers, brewers and wine makers, or their officers or directors, in any way concerning any of their products, obligating such retail dealers to buy or sell only the products of any such distillers, brewers or wine makers or obligating such retail dealers to buy or sell the major part of such products required by such retail vendors from any such distiller, brewer or wine maker, shall be void and unenforceable in any court in this state." (Italics ours)

And, Section 13139z-14 of the said Act (Laws of Missouri 1935, page 399, Mo. St. Ann. page 4166, Section 13139z-14), applicable to non-intoxicating beer, provides:

"Neither brewers nor manufacturers of non-intoxicating beer, or their employees, officers, agents, subsidiaries or affiliates shall, under any circumstances, directly or indirectly, have any financial interest in the retail business for the sale of such

> non-intoxicating beer, nor shall they, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for such beer sold to such retail dealers. All contracts entered into between such brewers or manufacturers, or their officers, employees, directors, or agents, in any way concerning any of their products, obligating such retail dealers to buy or sell only the products of any such brewer or manufacturer or obligating such retail dealers to buy or sell the major part of such products, required by such retail vendors from any such brewer or manufacturer, shall be void and unenforceable in any court in this state, and proof of the execution of such contract shall forfeit the license of both the vendor and the vendee." (Italics ours)

The question is not whether the use of trading stamps is illegal, but it is whether the act accomplished with or without their use is a violation of the above quoted statutes. From the facts stated in your said letter, it is clear that the trading stamp company, the various mercantile establishments, and the advertising firms are merely the instrumentalities of the brewers or wholesalers. The benefits accruing from redemption of bottle tops or caps are ultimately paid and provided chiefly, if not entirely, by the brewers and wholesalers.

The law does not prohibit the payment and furnishing of such benefits to the general public, as contradistinguished from retail dealers. However, in one plan the minimum number of stamps redeemable is 1,000; in the other plan the minimum number of caps redeemable is 200. In order to obtain 1,000 stamps, the individual citizen must buy and save stamps from 2,000 bottles of beer. In order to obtain 200 caps, one must buy and save caps from 200 bottles of beer. The

average citizen has no occasion to deal with such quantities of beer. The plans do not readily lend themselves to use by the general public. Only retail (by the drink) dealers or their agents or families, daily selling many bottles of beer and saving caps therefrom, have ready access to a sufficient number of bottle tops or caps to enable them to use the plans described in your letter. The redemption of bottle tops or caps is merely a method by which money or property is placed in the hands of retail dealers in order to encourage them to buy and sell the products of certain brewers and wholesalers.

It cannot rightly be said that used bottle tops or caps have any value. The only value which could possibly be attributed to them is the artificial one so attributed by the brewers and wholesalers in their plan to give money and property to retail dealers. Therefore, the benefits accruing from their redemption are for present purposes without consideration--they are given away. It is elementary that a gift is the transfer of property from one to another without consideration or compensation therefor (Ballentine's Law Dictionary, page 551). Certainly, such money or property is "furnished". The act of the brewers and wholesalers in furnishing and giving away cash directly or indirectly through their agents, to retail dealers in return for bottle tops or for stamps previously exchanged for bottle tops is a clear violation of the prohibition contained in both said Section 3 and said Section 13139-z-14 that they shall not "give away or furnish . . . money . . . to such retail dealers".

The giving away and furnishing to retail dealers by the brewers and wholesalers directly, and indirectly through their instrumentalities, of merchandise in exchange for stamps previously exchanged for bottle tops is a clear violation of the prohibition contained in both Section 3 and Section 13139-z-14, supra, that they shall not "give away or furnish equipment . . . or property of any kind . . . to such retail dealers."

The use of trading stamps and of other stores is at most a mere indirection. It is significant that both

Section 3 and Section 13139-z-14 provide that the things thereby prohibited shall not be done either "directly or indirectly".

The foregoing propositions are so plain that no further citation of authority is needed. However, an analogy is found in a case arising under the Federal Alcohol Administration Act, Amer. Distilling Co. vs. Wisconsin Liquor Co. (1939) 104 Fed 2nd 582, 123 A.L.R. 739. There, the plaintiff, a distiller, sold liquor to defendant, a wholesaler, and the action was for goods sold and delivered. On the defense that the transaction was illegal because plaintiff violated the law, the Seventh Circuit Court of Appeals ruled that even if the plaintiff had violated the law as to competition, the sale was legal. Apposite to this case, the court said at l.c. 742, 743 of 123 A.L.R.:

> "A salesman for plaintiff gave one salesman of defendant a traveling bag, and to another salesman of defendant a shirt, a $5 bill, and, on another occasion, a $5 or $10 bill. The reason for such gifts was to induce defendant's salesmen to make a strong effort to sell goods which plaintiff had delivered to defendant under the contract of sale. * * * * Section 205(c), 27 U.S.C.A. makes it unlawful for any person engaged in business as a distiller, brewer, etc., * * * * * * * * * by offering or giving a bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer,
>
> (a) to induce the trade buyer to purchase from the seller to the exclusion in whole or in part of the products of another seller in commerce; * The offering or giving of a bonus, premium or compensation is broader than

> commercial bribery and need not be for the purpose of directly influencing a buyer to purchase from the seller. It would include a case in which a seller influences an officer or employee of a buyer to push sales of the seller's goods to the exclusion of goods of competitors and thereby indirectly induces the buyer to buy from the seller. It is significant that the section makes it unlawful for a seller 'directly or indirectly' by commercial bribery or by offering or giving of any bonus, premium or compensation to induce any buyer to buy to the exclusion of the goods of competitors, etc."

Similarly, the case of Re Pennsylvania Whiskey Distributing Corporation (1939) 256 App. Div. 781, 11 N.Y.S. 2nd, 718, l.c. 721, was decided under Section 101, subdivision 1(c) of the alcoholic beverage control law, which made it "unlawful for a manufacturer or wholesaler . . . to . . . make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed . . . which may tend to influence such licensee to purchase the product of such manufacturer or wholesaler". Regarding that statute, the Appeals Division of the Supreme Court of N. Y. said, at l.c. 721, of 11 N.Y.S. 2nd:

> "The practice at which the statute appears to have been directed was the furnishing of free liquor, in large or small quantities, in order to influence the patronage of retailers."

The statutes of the United States, New York and Missouri are alike in their purpose of prohibiting gifts by brewers or wholesalers to retail dealers, designed to influence patronage. The Missouri statute goes further by

prohibiting the making of these gifts for any purpose. Violation of Section 3 or of Section 13139-z-14, supra, constitutes a legal ground for revocation of the licenses of brewers and wholesalers by the Supervisor of Liquor Control. Section 26 of said Act (Laws of Missouri 1937, page 531, Section 26, Mo. St. Ann. page 4689, Section 4525g-30) which applies to brewers and wholesalers of intoxicating liquor, provides:

> "Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall suspend or revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to suspend or revoke his license prior to the order of revocation or suspension issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing the grounds upon which his license is sought to be revoked or suspended."

Section 13139-z-24 of said Act (Laws of Missouri 1935, page 402, Mo. St. Ann. page 4166, Section 13139-z-24) which applies to brewers and wholesalers of non-intoxicating beer, provides:

> "Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to revoke his

> license prior to the order of revocation issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing of the grounds upon which his license is sought to be revoked."

With reference to a criminal prosecution, Section 26, supra, makes a violation thereof a misdemeanor. Section 13139-z-14 does not itself provide that a violation of its terms is a misdemeanor, but another section of the non-intoxicating beer law, Section 13139-y (Laws of Missouri 1939, page 827, Section 13139-y, Mo. St. Ann. page 4166, Section 13139-y) in part provides:

> "Any violation of any of the provisions of this article not otherwise defined, shall be a misdemeanor, and any person guilty of violating any of said provisions, and for which violation no other penalty is by this article imposed, shall, upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty ($50.00) Dollars, nor more than One Thousand ($1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence. If the person so convicted shall be the holder of any permit or license issued pursuant to the provisions of this article, such conviction by any court of competent jurisdiction shall, without further proceeding, action or order by any court or by the Supervisor of Liquor Control, operate to revoke and forfeit as of the date of such conviction such

> permit and all rights and privileges granted thereby, and the holder of such permit and all rights shall not thereafter, for a period of one year after the date of such conviction, be entitled to any permit for any person authorized in this act."

The term "person" includes a corporation (Section 43-a, Laws of Missouri, Ex. Ses. 1933-34, page 91, Mo. St. Ann. page 4689, Section 4525g-49; Section 13139-z-11, Laws of Missouri 1939, page 835, Mo. St. Ann. page 4166, Section 13139-z-11).

Regarding officers of corporations, Section 13139-x of said Act (Laws of Missouri 1935, page 398, Mo. St. Ann. page 4166, Section 13139-x) applicable to brewers and wholesalers of non-intoxicating beer provides:

> "It shall be unlawful for any officer, agent, or employee of any incorporated company, or association, acting for such corporation or association, to authorize or permit such corporation to violate any of the provisions of this article, and any such officer, agent or employee so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not more than one year or by a fine of not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1000.00) or by both such fine and jail sentence."

It is further noted that Section 3, supra, provides for fines graduated up to $5,000.00 for violations.

CONCLUSION

Where wholesalers or brewers of intoxicating liquor or non-intoxicating beer give money or merchandise directly, or indirectly through their agents, to a retail dealer in the sale of intoxicating liquor or non-intoxicating beer, in return for bottle tops or caps redeemed in the manner above described directly or indirectly by said retail dealer, the brewers and wholesalers are guilty of a violation of Section 3 and Section 13139-z-14 of the Liquor Control Act of the State of Missouri.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RT

LIBRARIES:
COUNTY LIBRARY DISTRICTS: Only city, village and township libraries organized as provided by Article 5 of Chapter 99, R. S. Mo. 1929, are exempt from provisions of act forming county library districts.

March 8, 1940

3-11
FILED
68

Miss Ruth O'Malley, Secretary
Missouri Library Commission
Jefferson City, Missouri

Dear Madam:

This is in reply to yours of recent date wherein you submit a question pertaining to county library districts based on the following statement of facts:

> "May I ask your opinion on a point in the law governing county libraries in Missouri Revised Statutes of 1929, Section 13463.
>
> "It has generally been assumed that the intent of the law regarding the exemption of libraries supported by taxation has referred to libraries for which a legal tax has been voted under Article 5, Sections 13448 - 13462.
>
> "This intention of the law has been questioned by Centralia in Boone County where a campaign for a County Library has been inaugurated. Centralia is receiving the sum of $180.00 from the City Council, although no legal tax has been voted by the citizens of that city.
>
> "In your opinion does the fact that a city is receiving an appropriation of the city disqualify that city from participation in the vote for a county library tax?"

County library districts are formed and operated under and by virtue of the provisions of Article 6 of Chapter 99, R. S. Missouri 1929. The provisions for the formation of such districts are provided for in Section 13463 of said article. This section provides as follows:

> "Whenever one hundred (100) taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '_____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid; and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April; and that the clerk of the county court shall cause to be published the proposition or propositions of such petition; and said county clerk shall cause said proposition or propositions to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as pro-

vided in section 10249, R. S. 1929. Such order of court and such notice shall specify the name of the county and the rate of taxation mentioned in said petition, and such county clerk shall make and file in his office, return of service of such notice; and every voter within such proposed county library district may, in his proper district, vote

'for establishing _____ county library district,'

or

'against establishing _____ county library district'

and may vote

'for _____ mills tax for a free county library,'

or

'against _____ mills tax for a free county library:'

Provided, that in case the boundary limits of any city or town hereinabove mentioned are not the same with the school district of such city or town, and such school district embraces territory outside the boundary limits of such city or town, then all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, submitted to the voters at such election, and may cast a vote thereon, at the nearest and most convenient district schoolhouse within said county library district. And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'for establishing _____ county library district,'

and for the tax for a free county

> library, the county court shall enter of record a brief recital of such returns and that there has been established
>
> '_____ county library district,'
>
> and thereafter such
>
> '_____ county library district'
>
> shall be considered and held to be established, shall be a body corporate, and known as such; and the tax specified in such notice shall, subject to provisions hereinbelow of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund,' and be kept separate and apart from other moneys of such county, and disbursed by the county treasurer only upon the proper authenticated vouchers of the county library board hereinafter mentioned: Provided, that such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

The remainder of this article, with the exception of Section 13467, R. S. Missouri 1929, deals with the

administration of the county library district act. Section 13467 of Article 6 provides as follows:

> "Whenever a free public library now or hereafter established and maintained, at least in part, by public taxation, already exists in any city or town within the territory of the county, all property in such city or town shall be exempted from any tax levy for the support of the free county library in such county library district, and the qualified voters of such city or town shall not be permitted to vote on the proposition for establishing _____ county library district, or on the proposition for a tax levy for establishing or maintaining a free county library."

It will be noted that any city or town within the territory of the proposed county library district, which has a public library and which is maintained by public taxation, is exempted from the tax autorized under the county library act and the residents of such city are not permitted to vote on the proposition for establishing the county library district.

Section 13448 of Article 5 of Chapter 39, R. S. Missouri 1929, provides for the establishment and maintenance of a free public library in cities, villages and townships. This section provides as follows:

> "When one hundred taxpaying voters of any incorporated city shall petition the mayor and common council asking that an annual tax be levied for the establishment and maintenance of a free public library in such incorporated city, and shall specify in their petition a rate of taxation, not to exceed two mills on the dollar annually, and in cities of over one hundred thousand inhabitants not to exceed two-fifths of one mill

> annually on all the taxable property in the city, such mayor and common council shall direct the proper officer to give notice in his next legal notice of the annual election, or special election, which may be called for the purpose of voting on such question, that at such election every voter may vote
>
> 'for a _____ mill tax for a free public library,'
>
> or
>
> 'against a ____ mill tax for a free public library,'
>
> specifying in such notice the rate of taxation mentioned in said petition; and if the majority of votes cast on such proposition shall be 'for the tax for the free public library,' the tax specified in such notice shall be levied and collected in like manner with other general taxes of such incorporated city, and shall be known as the 'library fund:' Provided, that such tax shall cease in case the legal voters of any such incorporated city shall so determine by a majority vote at any annual election held therein."

In your request you indicate that the Centralia library was not established and maintained in accordance with the provisions of said Section 13448. However, you do state that the library receives from city funds one hundred eighty dollars ($180.00) per year although no legal tax has been voted authorizing such appropriation. Again referring to the acts of the General Assembly providing for the establishment and maintenance of public libraries out of public funds it is quite apparent that that body has intended that such library shall be established and maintained in accordance with the provisions of the statutes applicable thereto.

The public library referred to by the Lawmakers in Section 13467, supra, is the one which the city or

town shall establish and maintain in accordance with the provisions of said Section 13448. That being the case, the property in the city or town which has not established and maintained its library in accordance with said Section 13448 would not be exempt from the taxes authorized by said Article 6 pertaining to county libraries and the qualified voters of such town or city would be permitted to vote on the proposition for establishing the county library district.

CONCLUSION.

From the foregoing it is the opinion of this department that the fact that a city library is receiving an appropriation from the city council would not disqualify the residents of such city from participating in the vote for the county library therein provided such city has not established and is not maintaining a free public library in accordance with the provisions of Section 13448, R. S. Missouri 1929.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

TAXATION AND REVENUE: Levy voted for county libraries must be kept within the limitations set out in Section 11 of Article 10 of the Constitution of Missouri.

March 26, 1940

3-27

FILED
68

Miss Ruth O'Malley
Secretary
Missouri Library Commission
Jefferson City, Missouri

Dear Miss O'Malley:

We are in receipt of your request for an opinion under date of March 20th, which reads as follows:

> "May we have an opinion on two additional points in the law governing the establishment of county libraries in Missouri (Section 13463, p. 3501, Revised Statutes 1929).
>
> "Does the fact that a county is levying taxes to its constitutional limitation prevent its voting on the establishment of a county library?
>
> "If not, when such a county votes a tax for a county library is the tax provided for from the general revenue or is it an additional levy."

Section 11, Article 10 of the Constitution of Missouri partially reads as follows:

> "* * * For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. * * * *"

The above section also provides for additional levies for school purposes. The only other constitutional section which provides for an additional levy in excess of that as set out in Section 11 of Article 10 of the Constitution is Section 22 of Article 10 of the Constitution, which provides for special road and bridge taxes.

Section 13463 R. S. Missouri, 1929, partially reads as follows:

> "Whenever one hundred (100) taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '_____ county library district,' and asking that an annual

> tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; * * * * * and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund,' and be kept separate and apart from other moneys of such county, and disbursed by the county treasury only upon the proper authenticated vouchers of the county library board hereinafter mentioned; * * * * * * * * * * * *"

Under the above section it will be noticed that the taxes levied and collected should be set aside in a separate fund and be known as the "county library fund."

In your request you state that a county is levying taxes to its constitutional limitation at the present time. Since Section 11 of Article 10, Constitution of Missouri, specifically states the limitation and does not provide for an additional levy of any kind except for school purposes, any levy under Section 13463, R. S. Missouri, 1929, must come within the limitations as set out in the constitutional limitation.

No case has been presented to the Supreme Court of Missouri in reference to this question on county libraries, but a very analogous case has been decided by the Supreme Court of the State of Missouri on the question of city libraries in which the city has levied the full limitations as authorized by the constitution.

In the case of Brooks v. Schultz, 178 Mo. 222, l. c. 227, the court said:

> "It is contended on behalf of respondent that section 11 of article 10, just quoted, is not a limitation on the power of the General Assembly, but only on that of the county, school district or municipal corporation, and as to them only a limitation on the power of taxation by that section conferred upon them. The proposition is that section 11 of article 10 confers directly on counties, school districts, cities and towns, authority to levy taxes to the limit therein specified; that that authority they may exercise independent of the will of the General Assembly, and that in addition thereto, they may impose such taxes as the General Assembly may authorize.
>
> "That is a misconception of that section. There is no language therein which is susceptible of the meaning that governmental power is conferred on counties, school districts and municipal corporations independent of the Legislature. The first sentence in the section only points out the character of property subject to taxation, and lays a restriction in the matter of assessing its value; all the rest of the section is negative in form and is in effect a declaration that be-

yond a certain limit, taxation shall not go; the provisos, though in form permissive, are but exceptions to the restrictions which they follow.

"Section 1 of article 10 declares: 'The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.'

"Section 10 of article 10 is: 'The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.'

"Then follows in immediate connections, section 11 which we have above discussed. The three sections read together mean that the General Assembly may authorize such corporations to levy taxes within the limits specified, but not beyond the limit unless otherwise in the Constitution specified.

"In the case before us, the city had already levied a tax of fifty cents on the hundred dollars valuation of taxable property in its jurisdiction; that was the limit of its taxing power and therefore this special tax of two mills on the dollar for library purposes is illegal, unless it can be brought,

as respondent seeks to bring it, within the exception which authorizes, under given circumstances, an increase in the rate of taxation for school purposes."

CONCLUSION

In view of the above authorities it is the opinion of this Department that a county which is levying taxes to its constitutional limitations may vote on the establishment of a county library. But such a tax must be allocated from the general revenue and is not considered an additional levy as set out for schools and bridges and roads. It is further the opinion of this Department that the tax so levied must be taken from the general revenue and be kept separate and apart from other moneys of such county.

Respectfully sumitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB/rv

CORONERS: STATE ANATOMICAL BOARD: Control of deceased persons to be buried at public expense.

April 12, 1940

W-7

FILED 68

Dr. M. L. Overholser, Secretary
Missouri State Anatomical Board
Columbia, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated March 20, 1940, which is as follows:

> "I have received a letter from Dr. D. M. Schoemaker, President of the State Anatomical Board, from which I quote as follows:
>
> 'The Coroner of St. Louis maintains as follows:
>
> 1. That the coroner must hold all bodies not less than twenty-one days.
>
> 2. That the coroner must have all unclaimed bodies embalmed.
>
> 3. That the coroner may deliver these bodies to an undertaker to be embalmed and not to the (local) Anatomical Board to be disposed of according to the provisions of House Bill #538, Section 4.
>
> 4. That the coroner challenges the provisions of House Bill #538, Section 4, lines 36 to 42, which reads as follows:
>
> "Whenever any person fails to give the notice and deliver the body of a deceased person as required by this act, and by reason of such failure such body shall become unfit for ana-

> tomical purposes, and is so certified by the duly authorized officer or agent of the Board, such body shall be buried at the expense of the person so failing to notify and deliver such body"'
>
> Will you please give us your ruling as to whether or not our State Anatomical Law supersedes the coroner's law in regard to the above points?"

Section 14723, R. S. Mo. 1929, provides that all general laws relating to the coroners of the several counties of the state shall apply to the coroner in the City of St. Louis, and his general duties are set out in Chapter 76, R. S. Mo. 1929. Without setting out such duties in full, it appears that only in the event of death by apparent violence or casualty does the coroner have any duty to perform with regard to any deceased person.

Section 11612, R. S. Mo. 1929, provides as follows:

> "Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

In addition to the foregoing section, under the heading of "Public Health and Vital Statistics", we find the following (Section 9047):

"In case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the registrar of such death, and when so notified, the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification, prior to issuing the permit: Provided, that when the local health officer is not a qualified physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts: Provided further, that if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, or the means of death; causes or violence, and whether (probably) accidental, suicidal, or homicidal, as determined by the inquest; and shall, in either case, furnish such information as may be required by the state registrar properly to classify the death."

Section 11626, R. S. Mo. 1929, is that relating to the disposition of bodies by the coroner, and is as follows:

"Whenever an inquest shall be held, if there be no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it is to attend to such burial, the coroner

> shall procure a cheap plain coffin, and cause a grave to be dug and the body to be conveyed thereto and buried. It shall be the duty of the coroner, in so doing, to avoid all unnecessary expense, and to render to the court an accurate statement of all money expended by him for such purpose; and the county court shall make to him a reasonable allowance for his actual expenses in procuring the coffin, hauling the body to the grave, digging the grave and burying the body; and also a reasonable allowance, according to the circumstances, for his own time and services in attending to such preparations and burial."

It should be noted that this section is applicable only when an inquest shall be held.

The 1939 Legislature enacted House Bill 538, which was an amendment to repeal Article III of Chapter 53, R. S. Mo. 1929, and enacted a new article in lieu thereof relating to the disposition of dead human bodies. That part of House Bill 538 giving the Missouri State Anatomical Board control of dead human bodies is Section 4, Laws of Missouri, 1939, at page 512, which is as follows:

> "Bodies of paupers, how disposed of. -- Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poor houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the Board, or the person duly designated by the Board or by its secretary to receive such notice, whenever any such body or bodies

come into his or their custody, charge or control, and shall, without fee or reward, deliver, within a period not to exceed thirty-six (36) hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the Board or its agent or agents to take and remove all such bodies, or otherwise dispose of them; Provided that each educational institution receiving a body from the Board shall hold such body for at least thirty (30) days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment. Each educational institution securing a dead body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to the secretary of the Board or his agent, which notice shall be by telegraph, when necessary to insure immediate notice. A correct record of all such bodies, including the name and date of death, shall be kept in a book provided for that purpose by the county clerk of the county in which such person died, and by the city Health Commissioner of the City of St. Louis, and such record shall be promptly furnished said officer by the person or persons reporting said bodies to the secretary of the Board or his agent. Whenever any person fails to give the notice and deliver the body of a deceased person as required by this act, and by reason of such failure such body shall become unfit for anatomical purposes, and is so

> certified by the duly authorized officer or agent of the Board, such body shall be buried at the expense of the person so failing to notify and deliver such body."

This section does not appear to be in any way in conflict with the statutes above set out which define the duties of the various coroners of the state since it excepts from its operation such bodies as are within the jurisdiction of a coroner, and such jurisdiction could operate only where he is holding an inquest. It is also plain from a reading of said Section 4 that, upon completion of the inquest, if no one appears to claim the body and it must be buried at public expense, such body must be turned over to the State Board.

The decision of the coroner as to whether or not an inquest must be held is final in this state since he acts in a judicial capacity in that respect. In Patrick v. Employers Mutual Liability Insurance Company, 118 S. W. (2d) 116, l. c. 123, we find this rule to be stated, as follows:

> "In this state a coroner acts judicially in respect to determining whether an inquest shall be held. Boisliniere v. The Board of County Commissioners, 32 Mo. 375."

It is apparent that Section 4 of House Bill 538 is directly in conflict with Section 11626, R. S. Mo. 1929. In this case it becomes necessary to apply the general rule of statutory construction, which provides that in the event of a direct conflict between statutes, the one last enacted by the Legislature shall govern. This rule is so generally accepted that no authorities to support it need be cited.

In view of the foregoing authorities, it is our conclusion that all dead human bodies which are unclaimed and required to be buried at public expense are within the exclusive charge and control of the State Anatomical Board and that all public officers, superintendents and wardens of penitentiaries and the other institutions set out in Section 4 of House Bill 538 must deliver such bodies into

the custody of said board within thirty-six (36) hours after death except that in cases where an inquest is held by any coroner he may retain said body for a longer period, if necessary, for the purposes of such inquest. At the conclusion of such inquest, he is required to surrender the control of such body to the State Anatomical Board, and is subject to the penalty set out in Section 4 of House Bill 538 if he wilfully fails to do so.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

COURTS OF RECORD: Under Section 11772, p. 679, Laws of Missouri 1939, a circuit judge holding court in two or more counties is entitled to $1300 salary as jury commissioner, and a probate judge may retain as part of his fees up to the amount of $1300 in addition to the other salary allowed circuit judges.

PROBATE JUDGE:

August 23, 1940 9/3

FILED
68

Hon. Edwin C. Orr
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of August 21, 1940, which reads as follows:

> "You will recall that the last session of the legislature raised the pay of the Circuit Judges. Prior to this last hike the Probate Judge's pay was determined by the fees collected by the Probate Judge's office and his total pay could not excede the amount of the Circuit Judges total income. Since the pay of the Circuit Judge was increased, is the Probate Judge entitled to the increase in his salary, providing of course the office earns sufficient fees to pay the increase.
>
> "I have not had an opportunity to brief this question myself, however, I can see that the point is going to be raised in this county and I would like the benefit of an opinion from your

> office as to the maximum pay that the Probate Judge is entitled to under the present statute, and would like your opinion as to whether or not the statute which increased the pay of the pay of the Circuit Judges, automatically increased the maximum amount of fees collected which the Probate Judge may retain as his pay. I will be grateful to you for an opinion on these questions at your earliest convenience."

Section 11765, R. S. Mo. 1929 reads as follows:

> "For their services as judges of the juvenile courts, also known or designated as the juvenile division of the circuit courts, the judges of the circuit courts in all counties containing less than fifty thousand inhabitants shall receive and be paid an annual compensation of fifteen hundred dollars, payable out of the state treasury at the end of each month in equal monthly installments and in the same manner as salaries of such circuit judges are now paid."

Section 11766 provides that the fifteen hundred dollars allowed under Section 11765 as salary to the circuit judge acting as juvenile judge should be considered as additional salary to that which is generally allowed as salary of the circuit judge.

Section 11767 partially reads as follows:

> "The officers of state shall receive for their services, annually, the following sums: First, the governor, the sum of five thousand dollars;

> second, the judges of the supreme court, each four thousand five hundred dollars; third, the judges of the circuit courts, each, two thousand dollars; * * *"

Under the above section the general salary, under the general law, of a circuit judge is two thousand dollars.

Section 11771, R. S. Mo. 1929, reads as follows:

> "Every judge of a circuit court or of a criminal court in this state shall be allowed and paid the sum of one hundred dollars per month as and for his expenses incident to the holding of all regular, special or adjourned terms of court at any place in his circuit other than the place of his residence therein, and such sum of money for said expenses shall be paid out of the state treasury monthly in the same manner that the salaries of circuit judges are now paid by law; provided, that this section shall not apply to circuits in cities of this state containing over 300,000 inhabitants nor to circuits consisting of one county only: Provided further, that in circuits which consist of one county only and not containing a city of 300,000 inhabitants or over, but in which court is held in more than one place, this section shall apply."

Under the above section the sum of twelve hundred dollars per year is allowed every circuit judge, or judge of a criminal court, for his expenses incident to the holding of court at any place in his circuit other than the place of his residence. This is not considered

as part of his salary and it was so held in Macon County v. Barnett R. Williams, 284 Mo. 447, 224 S.W. 835.

Section 11772, Laws of Missouri 1939, page 679, reads as follows:

> "In all counties in this state which now constitute, or may hereafter constitute, a separate judicial circuit with only one judge of the circuit court therein, the judge of such circuit court is hereby constituted a jury commissioner, whose duties as such commissioner shall be to assist the county court to prepare jury lists and to draw names as provided for in Sections 8754 and 8755, Revised Statutes 1929. Each such jury commissioner shall, as compensation for his services as jury commissioner solely, as provided in this section, receive a salary of twelve hundred dollars per annum, said salary to be paid by the county in equal monthly installments. In all judicial circuits in this State which circuits are constituted of two or more counties the circuit judge is hereby constituted a jury commissioner charged with the powers and duties herein prescribed, and for the performance of said duties he shall receive a salary of $1300.00, per annum, to be paid in equal monthly installments out of the State Treasury."

This new section repealed 11772, R. S. Mo. 1929, and added an additional payment of thirteen hundred dollars to the salary of a circuit judge where he acted as jury commissioner in two or more counties.

The population of Boone County, according to the 1930 Federal Decennial Census was 30,995. Boone County is in the 34th Judicial Circuit, which consists of Boone

County and Callaway County. Under all of the above sections concerning the compensation of a circuit court judge who sits in a judicial circuit consisting of two counties, his compensation should be as follows:

First: salary as juvenile judge fifteen hundred dollars (Sec. 11765, supra). Second: salary as circuit judge two thousand dollars (Sec. 11767, supra). Third: salary as jury commissioner thirteen hundred dollars (Sec. 11772 Laws of Missouri 1939, page 679, supra). And fourth: the amount allowed as expenses in the amount of twelve hundred dollars (Sec. 11771, supra). Being a total compensation of six thousand dollars.

Section 11782, R. S. Mo. 1929, partially reads as follows:

> "* * * Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the $1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent. thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; * * *"

Under the above partial section it is compulsory and mandatory that the judge of the probate court, after

deducting necessary expenses for clerk hire, shall turn into the school fund of the county any fees collected by him over and above the salary allowed under the statute to the judge of the circuit court having jurisdiction in his county. This section specifically excludes the twelve hundred dollars allowed the circuit judge as expenses when holding court in other counties. This section also specifically sets out that the salary of the probate judge should be equal to the salary provided by law for the judge of the circuit court (excluding the twelve hundred dollars allowed for expenses as above set out), and, since the Act of 1939 (Laws of Missouri 1939, page 679, supra), is now in effect the judge of the probate court should have the benefit of the new law allowing the judge of the circuit court additional pay as a jury commissioner.

Section 11782 does not exclude the salary of the judge of the circuit court as jury commissioner in setting the limitation of the retention of fees by the probate judge in accordance with the salary of the circuit judge, but does exclude the twelve hundred dollars expenses allowed the circuit judge in setting the salary of the probate judge.

Section 11782 is unambiguous and needs no construction.

In 59 C. J., page 952, it is said:

> "The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasin for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning." (Citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455,

314 Mo. 390; Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.)

The compensation of the circuit judge as jury commissioner was held to be "salary" in the case of State ex rel. v. Gass, 296 S. W. 431, l. c. 433, where the court said:

> "The lawmakers of 1921 knew the Supreme Court had, on the 13th of March, 1920, in the case of State ex rel. Buchanan County v. Imel, 280 Mo. 554, 219 S. W. 634, limited the compensation of the probate judge of Buchanan county to the $2,000 allowed to circuit judges as compensation for judicial services. They also knew, that on the 1st of October, 1920, the Supreme Court, in the case of Macon County v. Williams, 284 Mo. 447, 224 S. W. 835, held the $1,200 allowed to the circuit judges for expenses could not be considered by the probate judge of Macon county in determining the amount of his compensation during the year. They were not satisfied with the salary allowed probate judges, hence the amendment to said section 10991. The circuit judges of Jasper county have only two sources of compensation: Compensation for judicial services, and compensation for services as jury commissioner. The statute as amended provides that in determining the salary of the probate judges the compensation of the circuit judges from all sources must be considered. If we follow the statute, we must hold that the words 'from all sources' include the compensation of

> circuit judges as jury commissioners. It follows, and we hold, that from the taking effect of section 10981, R. S. 1919, as amended by the Laws of 1921, p. 604, the compensation of the circuit judges of Jasper county and the amount allowed to them for expenses are as follows: Compensation for judicial services, $2,000; compensation for services as jury commissioner, $2,500; for expenses, $1,200--making a total of $5,700 per annum. Of these items the probate judge of Jasper county was entitled to consider the $2,000 for judicial services and the $2,500 for services as jury commissioner in determining the amount he was entitled to retain out of the fees collected by him during the year for his salary."

As said in the above case, the intention of the legislature was clear, "they were not satisfied with the salary allowed probate judges, hence the amendment to said section 10991."

It is clear the intention of the legislature, in Section 11782, was that the probate judge of any county under the general law is entitled to retain fees in the maximum amount which would equal the compensation allowed circuit judges under the general law with the exclusion of the twelve hundred dollars allowed for expenses when holding circuit court in other counties.

CONCLUSION.

In view of the above authorities it is the opinion of this department that the judge of the probate court of Boone County, after deducting all reasonable and

necessary expenses for clerk hire, may retain from the amount of fees collected in any one calendar year the amount of $4800.00.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

WJB:CP

LOTTERIES: Trading stamp scheme with prize determined by chance is lottery.

9/14

September 12, 1940

FILED
68

Mr. Michael W. O'Hern
First Assistant Prosecuting Attorney
Kansas City, Missouri

Dear Mr. O'Hern:

This department is in receipt of your request for an official opinion which reads as follows:

> "Would you kindly let me know if the following state of facts would constitute a lottery as defined in our Statutes:
>
> "Booklets like the enclosed, bearing the gold seal, are furnished by the Kansas City Wholesale Grocery Company in lots of 100, to grocery stores for use by the stores in setting the plan in operation. You will note there is a blank space for the grocery store to stamp its name, and on the opposite side is a space for the customer to write his name and address.
>
> "With each twenty-five cent purchase at the particular store, the customer is given a receipt. As these receipts accumulate they are pasted on the card by the customer in the space provided. When completely filled with receipts, the customer is instructed to return the booklet to the store where the seal is broken by the groceryman in the presence of the customer. After the

seal is broken, it may reveal printed figures of STARS. If the figure of one star appears, the customer receives $1 in cash, or the cash award may be as much as $5, depending upon the number of stars beneath the seal. In one of the submitted booklets, five stars appear beneath the broken seal. In each lot of one hundred booklets only five of them will contain stars. We understand three booklets contain one star each, one booklet two stars, and one booklet five stars. Should the customer hold one of the five booklets entitling him to the cash award, we are informed the customer is required to sign one of the cards, photostat copies of which are attached.

"Should the person receive the $5 in cash, you will note he signs the card agreeing 'to give five of his friends the Treasure Chest Grocery Dividend Booklet, and explain how they may secure free samples of products by trading at the store'. We understand the cash award is given to the lucky customer immediately upon the breaking of the seal and he is not required to distribute the requisite number of books to his friends before receiving the money.

"The sponser of this plan admits the store does not attempt to compel the customer to distribute the booklets and that if it is done, it is entirely voluntary on the part of the customer, although the sponsor asserts the 'winners' are glad to distribute the booklets and perform the services designated. It is admitted that should the customer fail to keep his agreement, no action would be taken to compel him to perform his duties or services.

> "The Kansas City Wholesale Grocery Company contends that the five out of the one hundred customers who receive $1, $2 or $5 in cash, actually are receiving compensation for future services, which removes the cash award from the relm of a lottery prize, and makes it a payment for services. It is asserted that the store promoting the plan has the right to select employees or representatives by lot, and pay them for their services in advance.
>
> "In addition to the possibility of the holder of the booklet receiving the cash money, each holder is entitled to a merchandise award, which is revealed after the seal is broken. We are told by the sponsor that the various merchandise awards are approximately of the same value, since the customer has the choice of requesting fifteen cents in cash in lieu of the merchandise. All customers holding booklets filled with 100 receipts, representing $25 in merchandise purchases, will receive the merchandise award, or at their option, 15¢ in cash."

Section 10, Article 14 of the Constitution of Missouri, provides:

> "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or

> lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4314, R. S. Mo. 1929 (Mo. Stat. Ann. Sec. 4314, page 3002) provides:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

It will be noted that both the Constitution and the statutes prohibit any scheme in the nature of a gift enterprise. Just what is a gift enterprise has never been defined by the courts of Missouri. However, the legal lexicographers define the term as " a scheme for the division and distribution of certain articles of property to be determined by chance among those who have taken shares in the scheme". Black's Law Dictionary; Bouvier's Law

Dictionary and Anderson's Law Dictionary.

As was said in Lohman v. State, 81 Ind. 17, the words "gift enterprise" had attained such notoriety that the courts would take judicial notice of what was meant when they appear in legislative enactments.

A definition as given in Russell v. Equitable Loan, etc., 129 Ga. 154, 58 S.E. 881, is especially applicable to the instant case. The Court there said that "a gift enterprise is a scheme under which goods are sold for their market value, but by way of inducement each purchaser is given a chance to win a present or a prize".

The scheme present in your request is that a booklet is given to each customer which contains blank spaces in which trading stamps are to be pasted. The booklet also contains a seal, which, when the booklet has been filled with the stamps, is opened and the writing beneath the seal discloses whether the holder of the booklet is entitled to a nominal prize or gift or is entitled to receive $1, $2 or $5 in cash.

In Missouri it has been held that a lottery includes every scheme or device whereby anything of value is, for a consideration, allotted by chance. State v. Emerson, 318 Mo. 633, 1 S.W. (2d) 109.

The elements of a lottery are: (1) consideration; (2) prize; (3) chance. State ex inf. McKittrick v. Globe Democrat Publishing Co., 110 S.W. (2d) 705.

The weight of authorities supports the view that trading stamp schemes are not gift enterprises inasmuch as the chance element does not enter into such schemes. Especially is this view strengthened where the term "gift enterprise" is used in connection with the word "lottery" or "lotteries". 39 A.L.R. 1036; Humes v. Little Rock, 138 Fed. 129; Winston v. Beeson, 135 N. C. 271, 47 S.E. 457; State v. Sugart, 138 Ala. 86, 35 So. 28.

However, it is apparent that the element of chance is present in the scheme submitted in your request. The distribution of prizes is dependent upon an arbitrary and unforeseen contingency, that is, only one participant out of a hundred will receive $5.00; two will receive $2.00 and three will receive $1.00 each, such prizes to be determined

solely by what appears beneath the seal on the consumer's card.

The company sponsoring this scheme has attempted to take it out of the classification of a lottery or gift enterprise by providing that every person who wins must agree to give to a certain number of his friends one of the booklets and explain how they may secure free samples of the products by trading at the store.

In State v. McEwan, 120 S.W. (2d) 1098, l. c. 1102, it is said:

> "* * * 'As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful.'"

While the persons who win the prizes are required to do certain things, in consideration of the receipt of the prizes, however, as pointed out in your request, they are not required to do these things before receiving the money. Moreover, the thing to be done, that is, the distribution of the booklets to his friends, is merely a subterfuge to evade the lottery laws, because the work done is not compatible with the pay received.

Prize is defined in Fitzsimmons v. U. S., 156 Fed 477, as "anything of value offered as an inducement to participate in a scheme of chance".

In State ex rel. Home Planters Depository v. Hughes, 253 S.W. 229, 299 Mo. 529, our Supreme Court pointed out that:

> "This inequality in value constitutes a prize within the prohibition of the

constitution if the element of chance determines the distribution of the rights to loans."

In view of the above we are convinced that the scheme advanced in your request is a gift enterprise and contrary to the constitution and the statutes of this state and should not be allowed to operate.

CONCLUSION.

It is, therefore, the opinion of this department that a trading stamp scheme, of which the amount of the prize is determined by the number of stars under the seal on the booklet, is a gift enterprise within the prohibition of the constitution and statutes of Missouri and is illegal.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

AO'K:CP

CONTRACTS: Substantial change in a contract which, in effect, did away with the time limit provisions by implication of law gave reasonable time for performance of such work.

January 25, 1940.

FILED 69

Dr. Harry F. Parker
Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Dr. Parker:

We desire to acknowledge a request for an opinion made by your assistant, Mr. John W. Williams, Jr., on January 24, 1939, which reads as follows:

"From time to time, we have been receiving assistance from your office on legal matters relative the construction of the Trachoma Hospital at Rolla, Missouri, toward which we received an outright grant from the PWA.

"On December 9, 1939, the State Board of Health extended by resolution the contract of the J. E. Williams Construction Company, contractors on the Trachoma Hospital, PWA Docket Mo. 1418-F, to and including November 30th, and waived the assessment of liquidated damages which are provided for in the contract at $5.00 per calendar day for each and every day overrun.

"We would like our action in this matter supported, if possible, not only for the benefit of this organization, but it will readily assist the PWA in passing thereon; as you unstand, under our agreement with the Federal Government, all changes in contract revisions must have their approval.

"After the original contract for the construction of this hospital was approved, it

was discovered that certain changes were deemed essential, and other changes were requested which were job conditions which had to be met. All of these changes were first approved by the architect, approved by the governing body, the State Board of Health, known as the owner, and submitted to the PWA office at Omaha and approved by them. The gist of the problem in this instance is the contractor is claiming certain delays for extra work, which the State Board of Health, through their architect failed to make a part of the contractor's proposal for such extra changes, and as a consequence, have not heretofore obtained PWA approval for extra time on these extra work items.

"All of the delays claimed by the contractor are set out in the resolution of the State Board of Health on December 9, 1939, copy of which is attached.

"Will you please let us have an opinion as to whether or not the contractor is legally entitled to these delays by the laws of the State of Missouri."

F. W. A., P. W. A., P. W., 91820, Letter of Instruction No. 202 of September 12, 1939 is, in part, as follows:

"Therefore, where an Owner requests our concurrence in its determination to absolve the contractor from the payment of liquidated damages for an overrun in time caused by inclement weather, the Regional Director should disapprove such request unless (1) the record shows that the inclement weather complained of was so abnormal and unprecedented for such place and time that it could not have been reasonably anticipated when the contract was entered into, or (2) the contract can be interpreted under the law of the particular jurisdiction as otherwise relieving the contractor from the payment of liquidated damages for such overrun in time.

"Each case, however, must be studied in the light of its own peculiar and attendant circumstances. Whether liquidated damages can be collected depends upon the interpretation of the contract under the law in the particular jurisdiction in which the Owner is located."

Therefore, we presume that it is agreed that in construing the above contract with reference to any matter other than delay for inclement weather, as well as all supplemental contracts thereto depends upon decisions of the particular jurisdiction, i. e., the State of Missouri. The bond, under its terms, makes such the lex loci.

Section 4, A-10, of the Rolla Trachoma Hospital Contract, providing for changes, is as follows:

"Changes: Payment. The owner, upon proper action by its governing body, may authorize changes in the work to be performed or the materials to be furnished pursuant to the provisions of the contract.

"Adjustments, if any, in the amounts to be paid to the contractor by reason of any such change shall be determined by one or more of the following methods:

"(a) By unit prices contained in the contractor's original bid and incorporated in the construction contract;

"(b) By a supplemental schedule of prices contained in the contractor's original bid and incorporated in the construction contract;

"(c) By an acceptable lump sum proposal from the contractor:

"(d) On a cost-plus-limited basis not to exceed a specified limit (defined as the cost of labor, materials and insurance

> plus a specified percentage of the cost of such labor, materials and insurance; provided the specified percentage does not exceed 15 per cent of the aggregate of the cost of such labor, materials and insurance and shall in no event exceed a specified limit).
>
> "No claim for an addition to the contract sum shall be valid unless authorized as aforesaid. In the event that none of the foregoing methods are agreed upon with the contractor, the Owner may perform the work by force accounts."

According to your opinion request, the parties herein did not rely upon the original contract as to "changes", but entered into a supplemental agreement which said supplemental agreement included additional work and perhaps material and, as you stated to me verbally, mentioned no extension of time to perform such extra work.

In a supplemental contract dated July 26, 1939, wherein the contractor permitted the Board of Health, at its request, to use the basement before completion and in Section 7 thereof, it is provided:

> "7. That the owner, in the exercise of such occupancy, shall in no manner interfere with the construction program of the contractor."

Whether such occupation caused delay of completion is a matter of fact. However, if a breach of such condition caused delay certainly the contractor would not be liable for the time caused by such delay.

The supplemental proposal was made upon the basis that: "certain changes were deemed essential and other changes were requested which were job conditions which had to be met" as stated in your letter.

The original proposal not providing for the "certain changes" which "were deemed essential" and the supplemental

proposal providing for such changes, certainly created a presumption that the contractor would be given reasonable additional time for such additional changes, absent a provision in the original proposal controlling the question of extra time with reference to extra work embodied in the supplemental proposal. We are unable to find such a provision.

In giving a statement of facts and stating the rule in a case similar to this case, the court in, Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 620, said:

> "Plaintiff did not complete the viaduct by the 15th of July as agreed. It was not completed until the 15th of November. To excuse the delay it was shown that one of the steel piers, on demand of the railroad, had to be differently placed from that provided by the specifications. There was a conflict in the evidence as to the time necessarily lost by this delay, though it is clear that it was a substantial period. There was evidence tending to show that defendant did not furnish the lumber at the time agreed upon. So there was evidence that plaintiff did not begin the work until near thirty days after contract time in which it was to have been finished.
>
> "We think defendant to be right in his insistence that mere acceptance of the work and paying for it will not waive a claim for damages in not completing it in the time specified. (Redlands Orange Ass'n. v. Gorman, 161 Mo. 203.) As bearing upon the same principle see Atkins Bros. v. Grain Co., 119 Mo. App. 119.
>
> "But here the case shows that the parties themselves made a substantial change in the contract which, in effect, did away with the time limit provision, which left a reasonable time, implied by law, for the performance of the work.
>
> "In such circumstances it will not do to say that the contractor should yet be held to the time limited by the contract with an allowance

> of the time necessary for the changed conditions of the work. That might result in great injustice to the contractor. (Dannat v. Fuller, 120 N. Y. 554.) If that was desired it should have been inserted in the contract that any change of the work requiring longer time should not affect the time limit any further than necessary to do the changed work or meet the changed conditions." (Underscoring ours)

The same rule is restated in the case of Wentzel vs. Lake Lotawana Dev. Co., 226 Mo. App. 960, 983:

The time limit in the contract having been thus removed or waived by the act of the owner, there is substituted therefor an obligation on the part of the contractor to complete the building, extra work included, within a reasonable time, unless otherwise stipulated in the contract. (Cornish v. Suydam, 99 Ala. 620; Harrison v. Trickett, 57 Ill. App. 515; Bridges v. Hyatt (Sup. Ct.) 2 Abb. Pr. (N. Y.) 449; Greene v. Haines, 1 Hilt (N. Y.) 254; Lloyd on Building (2 Ed.), sec. 39; 30 Am. and Eng. Ency. Law (2 Ed.), 1257, 1258.)

CONCLUSION

Therefore, it is the opinion of this department that the parties to the contract making a substantial change in the same which, in effect, did away with the time limit provision, the contractor, by implication of Law, was entitled to a reasonable time for performing the additional or extra work and such contractor would not be liable therefor.

Respectfully submitted,

APPROVED:

S. V. MEDLING
Assistant Attorney General

W. J. BURKE
(Acting) Attorney-General

SVM:LB

TAXATION: Surplus in sinking fund must be applied to retirement of bonds and cannot be placed in general revenue until indebtedness is paid.

February 6, 1940

FILED
69

Mr. Eldon W. Palmer
County Clerk
Butler County
Poplar Bluff, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 2, 1940, which reads as follows:

> "In the year 1928 this County voted a bond issue for the construction of our Court House and Jail Building, each year the County Court has made a levy at the May Term of Court to retire the bonds and interest due for that year.
>
> For the year 1939 levy has produced $6,000.00 more than is necessary to pay the bonds and interest due, and the Court wants your opinion on the matter of using this fund to take care of other necessary obligations, other than paying bonds and interest. If this is a surplus before all bonds are paid, the last ones being due in the year 1948. * * * * *
>
> Our Prosecuting Attorney is out of the City at this time, but our Court is desirous of an opinion on this matter immediately."

There is an express statutory provision providing for the care and allocation of all money derived by tax levy for the retirement of bonded indebtedness and the payment of interest thereon. Section 2896, R. S. Mo. 1929, reads as follows:

"When any bonds shall have been voted or may hereafter be voted, as provided under the Constitution of the state, for the incurring of any indebtedness by any town, city, township, county, drainage, levee, county or school district, the proceeds from the sale thereof, and all moneys derived by tax levy for interest and sinking fund, as provided under the Constitution, shall be kept by the authorities of such town, city, township, county, drainage, levee, county or school district having control of said funds, separate and apart from any and all other funds of said town, city township, county, drainage, levee, county or school district, so that there shall be no commingling of said funds with any other funds of said town, city, township, county, drainage, levee, county or school district. The proceeds of any bonds or the sinking fund or the interest collected by reason thereof that may be held by any town, city, township, county, drainage, levee, county or school district, shall, upon the passage of this section, if commingled with other funds of said town, city, township, county, drainage, levee, county or school district, be separated and deposited in a separate fund from any and all other funds. In no case shall the proceeds from the sale of any bonds so sold be used for any other purpose than for the purpose for which said bonds were voted, nor shall the sinking fund or interest collected to meet the interest on said bonds be used for any other purpose than to meet the principal and interest of said bonds."

This section provides in definite terms that all tax money for the purpose of retiring a bonded indebtedness must be kept separate and apart from any and all other funds of the county. The following section, 2897, R. S. Mo. 1929, provides a punishment of a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1000.00) or imprisonment in the county jail for not exceeding one year, or by both such fine and imprisonment, for all authorities of any county or subdivision who violate the mandate of the foregoing section.

Section 2900, R. S. Mo. 1929, provides for the investment of any surplus sinking fund in state or United States bonds which must be deposited with the county treasurer.

Section 2903, R. S. Mo. 1929, reads in part as follows:

> "* * * * * Provided, that any state or United States bonds or money that may be left over after the extinction of all such county, city, town, village, township or school district indebtedness shall be paid into the general revenue fund of such county, city, town, village, township or school district."

In view of the foregoing statutory provision, it is the opinion of this department that any surplus provided by the tax levy for the retirement of bonded indebtedness and interest thereon must be kept in a separate fund or invested in bonds of the state or United States and, under no consideration, may such surplus be commingled with other funds until all the bonds are retired.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
RLH:VC

HEALTH: PUBLIC WATER SUPPLY:
CRIME: PUBLIC NUISANCE:
ELEEMOSYNARY:

Health Board should submit evidence of violations of law regarding public water supply to Prosecuting Attorney and institute prosecutions; should submit evidence of public nuisance regarding water supply to Prosecuting Attorney or Attorney General. Water furnished by penal eleemosynary boards not supervised by health board.

April 25, 1940

5/6

FILED
69

Honorable Harry F. Parker, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated March 8, 1940, in which you request our opinion in the following terms:

> "I wish to be advised as to whether or not in your opinion I am, as State Health Commissioner, discharging my duties and obligations as set forth in Sections 9031, 9032, 9033, and 9035 of the Revised Statutes 1929 concerning control of public water supplies. Further, if I am not complying with the Statutes I desire to be advised relative to the proper procedure.
>
> "In 1928 the attached regulations concerning public water supplies were adopted by the State Board of Health. At the present time the procedures outlined in the regulations are being required by this Board. Compliance is reasonably satisfactory except in certain cases of existing public water supplies where Sections 7, 8 and 9 of the regulations are being violated. In every case a careful investigation has been made and followed by a written report to the city officials outlining the defects and recommenda-

tions for correction prepared by our Engineering Division. Where corrections have not been made in reasonable time the city officials have been advised that their city water supply was no longer approved by this Board. No further action has been taken in any instance to force compliance with the State Board of Health regulations.

"It is in regard to this question of whether or not, and by what procedure, I should take further action in the case of unsatisfactory public water supplies that I particularly wish your opinion.

"I further desire your opinion as to whether or not water supplies maintained and operated by such state agencies as the Penal and Eleemosynary Boards should be considered public water supplies, or otherwise come under my legal supervision."

Sections 7, 8 and 9 of the Missouri Public Health Manual, Book V-Sanitary Code, Part VI, are as follows:

"Sec. 7. Quality - No water shall be provided or rendered available for use to the public for drinking or domestic use which is of unsatisfactory sanitary quality and is not approved by the State Board of Health.

"Sec. 8. Operation - Every owner is required to operate the water supply and water purification plant so as to obtain a degree of efficiency approved by the State Board of Health. A competent person, familiar with the principles and operation of a water supply and water purification plant, where treatment is required, shall be in charge of each plant. Whenever chemicals are used in connection with any purification process, a sufficient quantity of high grade material shall be kept on hand at all times to insure against ineffective operation due to delays in securing these materials.

"The owner shall make such suitable analyses and keep such records of operation as required by the State Board of Health, and shall submit copies of these records upon request to the State Board of Health.

"Sec. 9 Alteration or changes in Operation Required - If, after investigation, the State Board of Health finds that any water supply or water purification plant is in any way a menace to health on account of defective design, inadequacy, incompetent supervision or ineffective operation, or if the water is otherwise unsatisfactory for drinking or domestic purposes, such alterations and additions in the design or the construction or the equipment or such changes in the operation of the plant as are deemed necessary to produce satisfactory results shall be made in accordance with the recommendations of, and within the time limit set by the State Board of Health."

Section 9024 R. S. 1929, Mo. St. Ann., page 4180, providing certain duties for the Commissioner of Health, was repealed and re-enacted by the Laws of 1933, page 269, Section 1, which provided that said Commissioner "shall assume all duties heretofore conferred by law upon the Secretary of the State Board of Health heretofore authorized by law, which office is hereby abolished."

Section 9020 R. S. 1929, Mo. St. Ann., page 4179, providing certain duties for the Secretary, was repealed and re-enacted by Laws of 1933, page 269, Section 1, and provided in part that the "Commissioner of Health shall perform such duties as may be prescribed by the board and this article. * * *."

I.

Section 9031 R. S. 1929, Mo. St. Ann., page 4182, provides:

> "The state board of health shall make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public and for the collection of samples and analysis of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any service rendered under the rules and regulations to cover the cost of the service."

Section 9032, R. S. 1929, Mo. St. Ann., page 4182, provides, among other things, for the making of an analysis of water supplies to the public.

Section 9033 R. S. 1929, Mo. St. Ann., page 4183, provides:

> "On or before January 1, 1920, every municipal corporation, private corporation, company or individual supplying or authorized to supply water to the public within the state shall file with the state board of health a certified copy of the plans and surveys of the waterworks with a description of the methods of purification and of the source from which the supply of water is derived, and no additional source of supply shall thereafter be used without a written permit of approval from the state board of health, and no new supplies shall be established or dispensed to the public without first obtaining such written permit of approval. Whenever an in-

> vestigation of any water supply, plant, or methods used shall be undertaken by the state board of health, it shall be the duty of the municipality, corporation, company, institution or person having in charge the water supply under investigation to furnish on demand to the state board of health such information as that body considers necessary to determine the sanitary quality of the water being dispensed. Approval of new water supplies for municipalities must necessarily involve consideration of sewage provisions for safety to the public health."

Section 9035, R. S. 1929, Mo. St. Ann., page 4183, provides:

> "That every corporation, railway, common carrier, company or individual that shall fail to comply with the regulations prescribed by the state board of health under this article shall be guilty of a misdemeanor."

Section 9015, R. S. 1929, Mo. St. Ann., page 4178, in part provides that, "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns."

The above cited and quoted sections of the law make it the duty of the State Board of Health, where it has evidence of violations of the statutes and regulations governing public water supplies, to submit such evidence to the Prosecuting Attorney of the county where the violations occurred, and to take such action as is necessary to institute a criminal prosecution.

The statutes and regulations above cited and quoted make it the duty of municipalities, corporations, companies and individuals operating public water supplies to maintain the same free from pollution according to law and the regulations of the State Board of Health.

II.

As a part of the duty of the State Board of Health to enforce the statutes and regulations governing public water supplies, it should submit evidence in its possession of the illegal and improper manner of operation of a city water supply to the Prosecuting Attorney in the county affected, or to the Attorney General, for consideration whether such manner of operation constitutes a public nuisance which may be abated by an injunction, and whether suit for such injunction could be instituted and maintained.

In State ex rel Attorney General v. Canty, 207 Mo. 439, l. c. 456, 105 S. W. 1072, 15 L. R. A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cases 787, the court said:

> "It never was the law, in the absence of legislative authority, that courts of equity could enjoin the commission of crime generally. (Crawford v. Tyrrell, 128 N. Y. 341.).
>
> "This court has uniformly held that a court of equity has no jurisdiction to enjoin the commission of a crime, but that resort must be had to the criminal courts, which possess ample power to punish and prevent crime. (State ex rel. v. Schweickardt, 109 Mo. 496; State ex rel. v. Zachritz, 166 Mo. 307; State ex rel. v. Uhrig, 14 Mo. App. 413.)."

On that authority it is clear that the manner of operating a city water supply can not be enjoined merely on the ground that it is in violation of laws or regulations of a state board of health, and no statute in this state authorizes such action. However, a court of equity has jurisdiction to abate a public nuisance by injunction.

In State ex rel. Attorney General v. Canty, supra, at l. c. 459 of 207 Mo., the court ruled:

> "The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State is not tenable, as is fully shown by the following authorities: 2 Story's Equity Jurisprudence (13 Ed.), secs. 923 and 924; Crawford v. Tyrrell, 128 N. Y. 341; People v. St. Louis, 48 Am. Dec. 340; 21 Am. and Eng. Ency. Law (2 Ed.), 704; Attorney-General v. Jamaica Pond Aq. Corp., 133 Mass. 361; Carleton v. Rugg, 149 Mass. 550; Reaves v. Oklahoma, 13 Okla. 403."

For the purposes of this opinion it is assumed that the Board of Health can produce evidence that the city water supply is "of unsatisfactory sanitary quality," "a menace to health," "otherwise unsatisfactory for drinking or domestic purposes" (Secs. 7 and 9, Manual, supra,), or is poluted, and evidence of the manner of operation of such city water supply which causes or permits those conditions. The principles herein stated are general and each case will depend upon its own facts.

A. Polution of a city water supply constitutes a public nuisance. 2 Joyce on Injunctions, Section 1111a, page 1614. That authority cites Martin v. Gleason, 139 Mass. 183, l. c. 189, 29 N. E. 664, wherein it was ruled regarding a city water supply, that "the fouling of the water since the right to foul it ceased would be a public nuisance," and cited Brookline v. Mackintosh, 133 Mass. 215, 225, and Morton v. Moore, 15 Gray, 573, 576.

In Joyce on Law of Nuisances, Section 304, page 411, the above mentioned rule is stated, and it is said that "it constitutes an exercise of one of the ordinary functions of the police power of a state to abate such a nuisance as polution of a source of a city's water supply."

The location and operation of a piggery in such a manner as to pollute a public water supply was held to be abatable as a public nuisance in the following Pennsylvania cases: Commonwealth v. Soboleski, 153 Atl. 898, 303 Pa. 53; Lutz v. Department of Health of Commonwealth, 156 Atl. 235, 304 Pa. 572, followed in Commonwealth v. Goodwin, 156 Atl. 238, 304 Pa. 581; Commonwealth v. Banholzer, 156 Atl. 237, 304 Pa. 578, followed in Commonwealth v. Goodwin, 156 Atl. 238, 304 Pa. 581.

The foregoing authorities show that the pollution of a city water supply by private persons constitutes a public nuisance. Causing or permitting such pollution by the persons or corporation whose duty it is, as stated in Point I of this opinion, to operate such city water supply free from pollution according to law and regulations of the State Board of Health, likewise constitutes a public nuisance. "A nuisance may exist not only by reason of doing an act, but also by omitting to perform a duty." Joyce on Laws of Nuisances, Section 2, page 2.

B. Anything which endangers public health or safety is a public nuisance, and may be abated by injunction even before actual injury occurs.

The following definition is found in Joyce on Law of Nuisances, Section 5, page 10:

> "A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury, or damage may be unequal or may vary in its effect upon individuals."

Volume II, Joyce on Injunctions, Section 1055, page 1521: "A Board of health is entitled to maintain an action for an injunction where the State and city ordinance so provides and the nuisance endangers the public health."

In City of Ludlow v. Commonwealth, 56 S. W. (2d) 958, l. c. 959, 247 Ky. 166, the Court of Appeals of Kentucky affirmed a judgment imposing on a city a fine of $1500.00 for maintaining a common nuisance, saying, at l. c. 168 of 247 Ky., "As a matter of fact, however, the accumulation of filth in the basements was not only offensive to the owners and occupants of the houses, but necessarily imperiled the health of the people of the neighborhood, and no rule of law is better settled than that whatever endangers the public health is a public nuisance."

In Town of Cheektowaga v. Saints Peter and Paul etc. Church, 205 N. Y. S. 334, 335, 123 Misc. Rep. 458, the proposed use of land for a cemetery was enjoined as a public nuisance because it appeared water would drain from the cemetery to wells used to catch drinking water, and would, among other things, "annoy" or "endanger" public health or safety. To the same effect is Surratt v. Dennis, 155 S. E. 865, 199 N. C. 757.

In Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, a corporation chartered to supply fresh water to the public was enjoined from doing, in connection with that work, certain things which would constitute a public nuisance. At l. c. 363 of 133 Mass. the court said:

> "This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance, by partially draining the pond and exposing its shores, thus endangering the public health.
>
> "The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment, or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of

> these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy. Cadigan v. Brown, 120 Mass. 493."

In Board of Health of Lyndhurst, tp. v. United Cork Companies, 172 Atl. 347, 116 N. J. Eq. 4, affirmed Err. & App. 176 Atl. 142, 117 N. J. Eq. 437, operation of a cork factory producing conditions "hazardous to public health" was enjoined as a public nuisance, and, at l. c. 351 of 172 Atl. the court said:

> "Nor is there any legal merit to the insistment that the public nuisance here assailed is not 'hazardous to the public health' and, therefore, neither cognizable nor enjoinable in this statutory proceeding, since no one has been shown to have actually become afflicted with disease as a result thereof. The fallacy of this contention is in the fact that it would make the statutory operation dependent upon the existence of actual injury instead of mere hazard."

At the same page the court quoted with approval the following:

> "'Manifestly, the law-making power did not intend to create a board of health with power to act only when and after they had watched the "source of foulness" from its beginnings and along its various grades of progression, until it has embraced the strong, debilitated the healthy, and prostrated the weak.'"

In the cases above quoted the court was referring to a statute authorizing a board of health to maintain a suit for an injunction to abate a "nuisance hazardous to public health." This above stated rule that a public nuisance hazardous to public health may be abated before actual injury occurs applies to such a public nuisance in Missouri, because here even a threatened public nuisance may be abated by injunction.

In State ex rel. v. Canty, supra, bull fights and use of property in St. Louis for that purpose were enjoined. The principles therein stated applied to this case, because each is a case of a public nuisance affecting the public health. In State ex rel. v. Canty, supra, at l.c. 457, 458 of 207 Mo. the Supreme Court of Missouri quoted and followed this doctrine:

> "'A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-General of England, and at the suit of the State, or the people, or municipality, or some proper officer representing the commonwealth, in this country.'
>
> *
>
> "They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future;

> whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."

Operation of the city water supply in such a manner as to cause to permit pollution thereof and to supply water which is of "unsatisfactory sanitary quality" or "a menace to health" certainly endangers the public health, and is a public nuisance hazardous to public health. Such a manner of operation, undoubtedly, is a threatened public nuisance which may be prevented.

C. Operating a city water supply in such a manner as to constitute a public nuisance may be enjoined without stopping the legal and proper water supply to the public.

In 2 Joyce on Injunctions, Section 1072, pages 1547, 1548, the rule is stated in these terms:

> "In many cases, especially where property is used for the carrying on of a business, the nuisance is caused by the manner in which the business is conducted and not from the business itself. In such cases the injunction should not be granted against the carrying on of the business but should be against it being carried on in such a manner as to constitute a nuisance. Where a business can be so carried on that it will not constitute a nuisance an injunction restraining the carrying on of such business will not be issued but the court will so frame its order that the business may be continued, provided that it is so conducted as not to create a nuisance." (Citing authorities and examples)

In accordance with this rule, the St. Louis Court of Appeals approved an injunction restraining conduct of a rock quarry only in such a manner as to constitute a nuisance, in Schaub v. Construction Co., 82 S. W. 1094, 108 Mo. App. 122.

46 C. J. Section 416, page 792:

> "* * * Where the business or use of property alleged to be a nuisance is lawful and can be carried on without causing the injuries complained of, defendant should not be restrained from carrying it on at all; but the injunction should go merely against carrying it on so as to prove injurious or offensive, leaving defendant the right to carry it on in a proper manner, and the court may require defendant to use such appliances and methods as will remedy the nuisance, which methods or appliances should be practicable. * * *"

There need be no interruption of the supply of water to the city, because the court may allow a reasonable time for abatement of the conditions constituting a nuisance. The rule is thus stated in 46 C. J. Section 419, pages 793 and 794:

> "Where a use of property is found to be a nuisance it is proper to allow defendant a reasonable time to rearrange or remodel his appliances so that they will not further operate as a nuisance, or to remove his plant, before an injunction against the business or use is allowed to take effect.* * * * * * * * * * * In case the business cannot be conducted in the particular locality without the annoyance complained of, defendant may be enjoined from conducting the business in the locality altogether after a reasonable time, and mean-

> while he may be required to conduct the business in such manner as to cause the least annoyance possible, as the court may determine."

Substantially the same rule was applied by the St. Louis Court of Appeals in Magel v. Grueth Benev. Soc., 203 Mo. App. 335, 218 S. W. 704; and was applied in Grant v. Rosenberg, 196 P. 626, 112 Wash. 381, reversing judgment on rehearing (1920), 192 P. 889, 112 Wash. 361.

D. The Prosecuting Attorney of the county affected has authority to institute a suit for an injunction to abate a public nuisance. In State ex rel. v. Lamb, 237 Mo. 437, l. c. 455, 448-54, 141 S. W. 665, the court said:

> "Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond. * * * *"

E. The Attorney General has authority to institute in the county affected a suit for an injunction to abate a public nuisance. It was so ruled in State ex rel. Wear v. Springfield Gas and Electric Co., (Springfield Court of Appeals), 204 S. W. 942, and in State ex rel. Crow, Attorney General v. Canty, supra, where, at l. c. 448 of 207 Mo., it was said:

> "It is too well settled to challenge discussion that the suit was properly brought in the circuit court of St. Louis county, in the name of the State at the relation of the Attorney-General.* * * *"

III.

Section 9031, supra, gives the State Board of Health legal supervision of water furnished by "municipalities, corporations, companies or individuals." Those terms do not include the penal or eleemosynary boards.

Said Section 9031, supra, gives the State Board of Health legal supervision of water furnished "to the public." That term means "open to all; common to all or many, general; open to common use." It means the "community at large;" and is "not limited or restricted to any particular class of the community." It has been defined as "the body of the people at large; the people of a neighborhood; the community at large." 4 Words & Phrases (5th Ser.), pages 1068-1070, In the sense here employed, water furnished "to the public" does not include water furnished to inmates of penal or eleemosynary institutions.

Because of the foregoing propositions, water furnished by the penal and eleemosynary boards to its inmates is not subject to the legal supervision of the State Board of Health under existing legislation.

CONCLUSION

Where the State Board of Health has evidence of violation of the statutes and regulations governing public water supplies, it should submit such evidence to the prosecuting attorney of the county where the violation occurred and take such action as is necessary to institute a criminal prosecution. As a part of the duties of the State Board of Health to enforce the statutes and regulations governing public water supplies, it should submit evidence in its possession of illegal and improper manner

of operation of a city water supply to the prosecuting attorney in the county affected, or to the Attorney General, for consideration whether such a manner of operation constitutes a public nuisance which may be abated by an injunction, and whether suit for such injunction could be instituted and maintained. Water furnished by the penal and eleemosynary boards to its inmates is not subject to the legal supervision of the State Board of Health under existing legislation.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH/rv

BOND ISSUES: Funds raised to pay bonded indebtedness cannot be transferred and applied to the payment of general indebtedness.

May 1, 1940

5-1

FILED
69

Hon. Eldon W. Palmer
County Clerk
Poplar Bluff, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 26th, directed to the attention of Mr. Hewitt, in which you have asked for an opinion upon the following question:

"Relative to our conversation in your office yesterday regarding the surplus in the Court House & Jail Bond fund of this county and the need of transferring said fund to another that is badly in need of same.

Excessive levy for Court House & Jail Bonds has resulted in a surplus in this fund for the year 1939, which is no longer needed for the year as all the bonds and interest are paid and cancelled for the year 1939.

May we transfer this surplus which accrued from excessive levy to other funds that is badly in need, since we believe this arrangement will be satisfactory to the bond holders, and since we are obliged to pay 6% interest on the warrants that are outstanding, and if this transfer can be made it will mean quite a saving to this County.

A levy is made each year for the retirement of bonds and interest on the Court House & Jail, and the last bonds will be paid in the year 1948."

Authority for the issuance of bonds by counties to build public buildings and the levy of the tax for the payment of such bonds and the interest thereon, is granted by Section 11, Article 10 of the Constitution of Missouri. The same section also limits the rate of taxation by counties for general county purposes. Such section is, in part, as follows:

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. * * * * * * Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor."

Section 12, Article 10 of the Constitution of Missouri, limits the amount of indebtedness which may be incurred

by political corporations or subdivisions of the State under authority of the exceptions contained in Section 11.

Pursuant to the authority of Section 11, Article 10 of the Constitution, Article 5, Chapter 15, R. S. Mo. 1929 has been enacted. This article lays down the procedure to be followed in submitting such proposition to the voters, and the issuance of the bonds when the proposition carries, the levying of a tax to pay the interest and principal of the bonded indebtedness and the creation of a sinking fund.

The funds collected under a tax levy for general county purposes are the property of the county and are to be applied by the county court, first, for items of general expense under their statutory classification; second, to any other lawful county purpose when there is a surplus in any of the various funds over and above the debts for the year for which the tax was levied. This being authorized by Sections 12167 and 12168 R. S. Mo. 1929, and cases of State ex rel. v. Appleby, 136 Mo. 408 and Decker v. Diemer, 229 Mo. 296.

The funds collected under a special levy for the payment of principal and interest of a bonded indebtedness are not the property of a county, but are collected by it as trustee for the bondholders, it being a special fund raised for a particular purpose.

> "Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose, and neither can funds derived from taxes levied and collected for particular purposes be legally utilized for, or diverted to, any other purpose, some constitutional provisions expressly so providing." 61 C. J. Para. 2235, p. 1521.

In the case of State ex rel. Hopper v. Cottengin, 172 Mo. 129, a case in which it was sought to compel a county to pay a general judgment from a fund raised by taxation for the purpose of building a court house the Supreme Court, at page 135 said:

"The fund in question was no part of the general revenue fund of the county. It was a special fund raised for a particular purpose, and neither the county court nor the county treasurer had any right to apply a dollar of it to any other purpose. If, on the one hand, the bonds are valid, and the taxes were legally levied, the bondholders are entitled to it. If, on the other hand, the bonds are invalid, or the taxes were illegally levied, the taxpayers from whom it was illegally and wrongfully wrested are entitled to it. In neither event is the county entitled to it, and in neither event is it applicable to its general indebtedness."

CONCLUSION.

It is the conclusion of this department that there can be no transfer of a surplus in the court house and jail bond fund for the purpose of paying general county obligations as long as there remains any portion of the bonded indebtedness outstanding and unpaid.

In your request for opinion you mention that your county is obliged to pay six per cent interest on outstanding protested warrants. An opinion written January 25, 1939, by Max Wasserman, Assistant Attorney General, to Mr. Paul J. Clay, Clerk of the County Court, St. Francois County, Farmington, Missouri, on the subject of reducing interest on county warrants is enclosed herewith. It may be of some assistance to your county court.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

WOJ:CP

BOARD OF HEALTH:
COSMETOLOGISTS, HAIRDRESSERS AND MANICURISTS:
RECIPROCITY:

Board of Health may issue licenses of reciprocity without examination to cosmetologists, hairdressers and manicurists if any such applicant is either duly licensed in another state or has practiced for at least five years.

May 1, 1940

5-1

FILED
69

Honorable Harry F. Parker
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Parker:

We have received your letter of April 23rd which reads as follows:

> "Will you kindly give us an opinion on Section 9100, reciprocity with other states, with reference to Cosmetology, Hairdressing and Manicuring.
>
> "There seems to be a difference in the interpretation of this Section. My interpretation is that an applicant must be licensed in another state which has requirements equal to those in force in this state and must have practiced continuously for five years before being granted license to practice Cosmetology, Hairdressing or Manicuring in this state by reciprocity. The Director of the Moler System of Colleges, F. W. Agney, contends that Section 12 or 9100, leaves two methods open in securing license by reciprocity. First method is producing evidence that one has met the requirements of a state with equal requirements to this state. The second method is showing proof of five years' experience as an operator in a state where they have no standards or a state law."

Section 9100, R. S. Missouri 1929, deals with the powers given to the State Board of Health as to reciprocity with other states in connection with the licensing of cosmetologists, hairdressers and manicurists. This section reads as follows:

> "The state board of health may dispense with examinations of applicants as provided in this article, and may grant certificates of registration under respective sections upon the payment of the required fees, provided that such applicant has complied with the requirements of another state, territory, District of Columbia or foreign country, state or province wherein the requirements for registration are substantially equal to those in force in this state at the time application for such certificate is filed and that extend like privileges or upon due proof that such applicant has continuously practiced the classified occupation for which a license is applied for at least five years in a foreign state or country immediately prior to such application and upon the payment of a fee of fifteen dollars." (underlining ours)

It will be observed that the legislature has stated that the State Board of Health may dispense with examinations of applicants and may issue certificates of registration without an examination provided the applicant has complied with the requirements of another state wherein the requirements for registration are substantially equal to those of this state, or such certificates may be issued without examination if the applicant has continuously practiced the classified occupation for at least five years in such foreign state. By the use of the word "or" as it is used, the legislature undoubtedly intended to give the Board the right to issue a license without examination under either of two sets of conditions. The first condition is if the applicant has fully complied with the laws of another state which are equal to our own, or second, if the applicant has practiced continuously for at least five years in another state immediately prior to the application.

The word "or" was defined by the Supreme Court of Missouri in the case of State v. McGee, 83 S. W. (2d) 98, l. c. 110, as follows:

> "* * * Or 'is a disjunctive participle that marks an alternative generally corresponding to "either," as "either this or that."' 46 C. J. 1124, Section 1; State v. Combs (Mo. Sup.) 273 S. W. 1037, 1039 (1); Dodd v. Independent S. & F. Co., 330 Mo. 662, 671 (8), 51 S. W. (2d) 114, 118 (9). 'A disjunctive conjunction coordinating two or more words or clauses each one of which in turn is regarded as excluding consideration of the other or others.' Century Dictionary. * * * * * * * * * * * "

From the wording of the statute we are of the opinion that the legislature used the word "or" as it is ordinarily used, that is, in the disjunctive and as an alternative; that if "either" of the two situations arose the Board might issue the license; that it is not necessary therefore for both situations to be present, that is, a license from another state together with five years of practice, to enable the Board to issue a license without an examination should it care to do so. The legislature, if it intended otherwise, would undoubtedly have worded Section 9100 as is worded Section 11703, R. S. Missouri 1929, which deals with attorneys. This section reads in part as follows:

> "* * * Any person becoming a resident of this state after having been admitted to the bar of any other of the United States in which he has previously resided may, in the discretion of the supreme court, be admitted to practice in this state without examination, on proof of the other qualifications required by this chapter, and on satisfactory proof that he has been duly licensed to practice law in the state from which he comes and has practiced law

regularly in such state for a period of three years."

In other words, if the Supreme Court of Missouri should find that an attorney licensed in another state meets all of the requirements of the Missouri laws for admission without examination and also has practiced law regularly in such state for a period of three years any such applicant could be admitted without examination. The conjunctive word "and" is used in the above section which requires both a license to practice in the other state as well as three years of actual practice. However, the legislature did not see fit to word Section 9100 in a similar way.

As we suggested above, Section 9100 merely says that under certain circumstances the Board "may" dispense with an examination and "may" grant certificates without an examination. In this connection you have asked the question, at least indirectly, whether the Board must issue a license if the applicant from another state meets either one of the requirements of the statute.

A similar question was asked this department in connection with licenses to practice medicine by Dr. T. S. Bourke, former President of the State Board of Health. On May 27, 1936, we addressed an opinion to him holding that the word "may" as similarly used in Section 9113, R. S. Missouri 1929, concerning reciprocity, did not absolutely require in each instance that the Board waive an examination; that the word "may" as used meant that the Board, in the exercise of its sound discretion, might refuse to license applicants on reciprocity from other states. We are attaching a copy of said opinion for the reason that Section 9100 is worded similarly to Section 9113, at least as far as the word "may" is used, and under the same reasoning there appears no mandatory duty on the Board to issue licenses to cosmetologists, hairdressers and manicurists on reciprocity from another state any more than the same duty is imposed on the Board in connection with licenses to practice medicine and surgery.

CONCLUSION.

We are of the opinion that it is not necessary that an applicant for a license to practice cosmetology, hairdressing and manicuring on reciprocity from another state shall have been duly and regularly licensed under laws substantilly equal to the Missouri laws, and also that such applicant shall have practiced the occupation for at least five years next preceding the application. Section 9100, R. S. Missouri 1929, provides that the State Board of Health may issue a license on reciprocity if the applicant complies with either of the two provisions. However, since the word "may" is used there appears no mandatory duty on the Board to issue such a license on reciprocity and without an examination and the Board may exercise its sound discretion in passing on each individual application for a license on reciprocity.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:DA

HOTELS: Board of Health has no authority to require fire escapes on fireproof hotels in Kansas City.

May 22, 1940

5-73

FILED
69

DR. H. F. PARKER
State Board of Health
Food & Drug Division
Jefferson City, Missouri

Gentlemen:

This Department is in receipt of your request for an opinion which reads as follows:

"Your Department on July 5, 1939, rendered an official opinion which held that all hotels having over two stories must be provided with steel or iron fire escapes. We would like your opinion as to whether, under this ruling, this Department may refuse a license to or close a hotel in Kansas City which is more than three stories high, but does not have outside fire escapes."

Section 13084, R. S. Mo. 1929, provides:

"It is hereby made the duty of the food and drug commissioner to inspect or cause to be inspected, at least once annually and as often thereafter as he may deem necessary, every hotel in the state, and for that purpose he shall have the right of entry and ac-

cess thereto at any reasonable time. Whenever, upon such inspection, it shall be found that such business and property so inspected is not being conducted, or is not equipped in the manner and condition required by the provisions of this article, it shall thereupon be the duty of the food and drug commissioner to notify the owner, proprietor or agent in charge of such business, or the owner or agent of the building so occupied, of such changes or alterations as may be necessary to effect a complete compliance with the provisions of this article. It shall thereupon be the duty of such owner, proprietor or agent in charge of such business, or such owner or agent of the building so occupied to make such alterations or changes as may be necessary to put such building and premises in a condition that will fully comply with the provisions of this article; all permanent repairs and alterations to the building and premises to be made by the owner thereof; Provided, however, that thirty days' time after receipt of such notice shall be allowed for conforming to the requirements of this article. If at the expiration of the required notice such owner or agent of the building so occupied refuse or fail to comply with said sections mentioned in such notice, then it shall be the duty of the food and drug commissioner to close said hotel until such requirements are complied with."

Under the above statute the Food and Drug Commissioner may close a hotel when said hotel does not comply with the provisions of Chapter 93, Article VII, which deals with the inspection of hotels, common inns and boarding houses.

Section 13096, R. S. Mo. 1929, which is a part of Article VII, provides as follows:

> "Every hotel that is more than three stories high shall be provided with one hall or more on each floor extending from one outside wall to the other, and at each end of such hall or halls shall be equipped with an iron fire escape on the outside of the building, connecting with openings on each floor above the first. Said escape shall be fastened and secured with landings not less than six feet in length and three in width, guarded by an iron railing not less than three feet in height. Such landing shall be connected by iron stairs not less than two feet wide and with steps of not less than six inches tread, placed at an angle of not more than forty-five degrees and protected by a well secured handrail on both sides and reaching to within twelve feet of the ground with a drop ladder twelve inches wide reaching from the lower platform to the ground. Such fire escapes shall be sufficient if a perpendicular iron ladder shall be used instead of the stairs: Provided, such iron ladder is placed at the extreme outside of the platforms and at least three feet away from the wall of the building; and provided, said ladder is equipped with round iron rounds not more than

> fifteen inches apart. The way of egress to such fire escapes shall at all times be kept free and clear of all obstructions of any and every nature, and at every opening to every fire escape a red light shall be kept burning at night. Storm windows and storm doors shall be considered an obstruction for the purpose of this chapter, and such way of egress shall at all times be kept unlocked. There shall be posted and maintained in a conspicuous place in each hall and in each guest's room, except the halls and rooms on the ground floor of such hotel, a printed notice in characters not less than two inches high, reading, 'Fire escapes are indicated by red lights:' Provided, however, that none of the provisions of this section shall apply to and be binding on hotels of fireproof construction situated in cities now having fire and building ordinance regulations, and which are erected and maintained in compliance with such fire and building ordinances." (Underscoring ours).

The above statute provides that all hotels of more than three stories shall have outside iron fire escapes except those hotels of fireproof construction which are situated in cities having fire and building ordinances and which were erected and maintained in compliance with such ordinances. A reading of the ordinances of Kansas City discloses that that city had fire and building ordinance regulations when the law was enacted in 1917 and it still has such regulations. ("Building Code", Ordinance No. 54234).

Therefore, it is apparent that since Kansas City has fire and building ordinance regulations and if a hotel has been erected and is maintained in compliance with such fire and building ordinance regula-

tions, then that part of Section 13096 which provides all hotels of more than three stories shall be provided with iron outside fire escapes does not apply, and the Food and Drug Commissioner would have no authority to refuse a license or to close such hotel. However, if a hotel in Kansas City is not of fireproof construction and has not been erected and maintained in compliance with the fire and building ordinance regulations, then the Food and Drug Department of the State Board of Health has jurisdiction in seeing that the provisions of Section 13096 are complied with.

The previous opinion rendered by this Department on April 5, 1939, relied upon Section 13757, R. S. Mo. 1929, which is the general section requiring fire escapes for all buildings, including hotels. Since the rendition of that opinion, the Supreme Court of Missouri, in the recent case of Collins v. Twellman, 126 S. W. (2d) 231, has held that section 13757 in so far as it relates to hotels, has been repealed by section 13096 and that in determining what fire escapes a hotel must have, Section 13096 must be looked to exclusively.

Therefore, in so far as the opinion of July 5, 1939, is contrary to the conclusion of this opinion, then so much of that opinion is hereby overruled.

CONCLUSION

It is, therefore, the opinion of this Department that the State Board of Health has authority to close a hotel of over three stories in Kansas City because the hotel has no outside fire escapes, if said hotel is not of fireproof construction and was not

erected and is not maintained in compliance with the fire and building ordinances. However, the State Board of Health has no authority to close a hotel of over three stories because of the lack of outside fire escapes, if said hotel is of fireproof construction and was erected and is maintained in compliance with the fire and building ordinance.

Very truly yours,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AO'K:RV

MUNICIPAL CORPORATIONS: City of third class cannot pass ordinance requiring prescription for the sale of sulfanilamide and barbiturates.

September 20, 1940

9-23

FILED
69

Dr. Harry F. Parker
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "I should like to know if it would be legally possible for the City of Cape Girardeau to pass an ordinance prohibiting the sale of sulfanilamide and barbiturates except upon the prescription of a physician."

At the outset it is necessary to determine the nature of the product sought to be regulated.

A barbiturate is a soporific; a sleep inducing drug or medicant. (Webster's New International Dictionary.) The working and effect of "sleeping pills" is well known and something of which we may take judicial notice. (Childers v. Ins. Co., 37 S. W. (2d) 490; Smiley v. Ins. Co., 52 S. W. (2d) 12.) It is common knowledge that any type of barbiturates taken in moderation is not harmful, but an overdose is likely to result in serious complications and even death.

The drug sulfanilamide is, however, notso well known by the general public and its efficacious properties in regard to disease is still in the seminal stage in so far as the medical profession is concerned.

Although the drug was discovered thirty years ago, by one Gelmo, an industrial chemist employed by a German chemical manufacturer, still it was not until the last four or five years that its curative powers have been definitely established. (Mellon's Sulfanilamide theraphy, Bacterial Infections.)

Sulfanilamide is a white powder derived from coal tar. It has great curative powers and germ killing ability. (Pfeiffer's Sulfanilamide - Harper's, March, 1939, page 393.)

As stated above this drug is of recent discovery and doctors do not agree as to its deleterious effects. It seems that the drug causes such symptoms as dizziness, headache, nausea, weakness, jaundice and rashes. (Hygeia, October, 1938; Harper's Magazine, March 1939; Popular Science Monthly, March, 1939.)

A heavy dosage with the drug seems seriously to affect the red or the white blood cells, or both, with development of serious conditions and with some fatalities.

John Pfeiffer, writing in Harper's Magazine, quotes Dr. Mellon as saying: "The drug is clearly not a uniform remedy to be bought and used by anyone who bothers to walk into the corner drug store."

Donald Armstrong in Hygeia, October 1938, says: "For normal human beings it is extremely dangerous to treat one's self with it, or to have it used except under the most careful medical supervision."

However, both authors point out that these symptoms, caused by an over use of the drug, seem to be controllable by a physician without endangering the patient. Moreover, as J. D. Ratcliffe points out in Collier's, December 24, 1938, three pounds of the medicine would be necessary to bring on death in a hundred and eighty pound man.

A conclusion of all the writers seems to be that sulfanilamide is dangerous only when taken in excess, but that due to its different reaction upon different types of people, that the drug should be taken under a doctor's supervision.

The power under which everything necessary to the protection of the health and comfort of the public may be done is called the police power. This power as defined by Blackstone, concerns "The due regulation and domestic order of the Kingdom." (4 Bl. Com. 162.) The source of the police power of a municipal corporation is the state (State ex inf. Barker v. St. Louis Merchants Exchange, 269 Mo. 346, 190 S. W. 903; 43 C. J. 203), and although this police power primarily inhers in the state, the Legislature may delegate such power to the municipal corporations (McQuillin on Municipal Corporations, Vol. 3, Sec. 949; Jackson vs. Railroad, 157 Mo. 621, 58 S. W. 32).

As was said in Tiedeman's on Limitation of Police Powers, page 639: "The police power of a municipal corporation must depend upon the will of the Legislature and in order that a city, town or county may exercise that particular police power it must be fairly included in the grant of powers by the charter."

In St. Louis v. King, 226 Mo. 334, l. c. 345, our Supreme Court said:

> "'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: First, those granted in express words. Second, those necessarily or fairly implied in or incident to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable. * * *'"

While it has been held that there is no inherent police power in a municipal corporation (43 C. J. 205; McQuillin's Municipal Corporations, Vol. 3, paragraph 949), still it appears, from the rule laid down above, that if the power is essential to the declared objects and purposes of the corporation then it may be exercised.

A review of the statutes relating to cities of the third class, to which class Cape Girardeau belongs (Section 6092, R. S. Mo. 1929), discloses many sections relating to the police power delegated by the legislature to the municipal corporation (Sections 6803 to 6811, R. S. Mo. 1929). A reading of these sections discloses no specific delegation of the right to regulate harmful drugs. The section that deals closest with this matter is Section 6803, R. S. Mo. 1929, which is known as the general welfare section. (St. Louis v. World Publishing Company, 126 S. W. 1019, 227 Mo. 146.) This section (6803) provides as follows:

> "The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Moreover, as pointed out in Freund's Police Power, page 133: "The prohibition of articles of consumption possibly, but not undoubtedly, injurious to health, may under certain circumstances be conceded to the Legislature of the state, but cannot be introduced by local authorities under mere general grants of power."

In Knapp v. Kansas City, 48 Mo. App. 485, it is said:

> "The general welfare clause of a charter of a city which follows a long list of specific powers like

> the one here, should not be construed so as to enlarge the powers of the city further than is necessary to carry into effect the specific grant of powers."

It seems to be the rule that rights recognized by the general laws cannot be restrained by an ordinance without the Legislative grant expressed or implied. (St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094; State ex rel. v. Berryman, 142 Mo. App. 373; 43 C. J. 217.

Section 13152, R. S. Mo. 1929, provides for the regulation of the sale of poisons and reads as follows:

> "It shall be unlawful for any person to retail any poisons enumerated in schedules 'A' and 'B,' except as follows: Schedule 'A'--arsenic and its preparations, biniodide of mercury, cyanide of potassium, hydrocyanic acid, strychnia, and all other poisonous vegetable alkaloids and their salts, and the essential oil of bitter almonds. Schedule 'B'--opium and its preparations, except paregoric and other preparations of opium containing less than two grains to the ounce, aconite, belladonna, colchicum, conium, nux vomica, henbane, savin, ergot, cotton root, cantharides, creosote, veratrum, digitalis, and their pharmaceutical preparations, croton oil, chloroform, chloral hydrate, sulphate of zinc, corrosive sublimate, red precipitate, white precipitate, mineral acids, carbolic acid, oxalic acid, without labeling the box, vessel or paper in which the said poison is contained, and also the outside wrapper or cover with the name of the article, the word 'poison' and the name and place of

> business of the seller. Nor shall it be lawful for any person to sell or deliver any poisons enumerated in schedules 'A' and 'B' unless, upon due inquiry, it be found that the purchaser is aware of its poisonous character and represents that it is to be used for legitimate purposes. Nor shall it be lawful for any registered pharmacists to sell any poisons included in schedule 'A' without, before delivering the same to the purchaser, causing an entry to be made in a book kept for that purpose, stating the date of sale, name and address of purchaser, the name of poison sold, the purpose for which it was represented by the purchaser to be required and the name of the dispenser--such book to be always open for inspection by the proper authorities, and to be preserved for at least five years. The provisions of this section shall not apply to the dispensing of poison in not unusual quantities or doses upon the prescription of practitioners of medicine. Nor shall it be lawful for a licensed or registered druggist or pharmacist to retail, sell or give away any alcoholic liquors or compounds as a beverage."

It will be seen that under the general laws of this state that poisons may be sold without prescription if certain records are kept as to the purchaser and if the buyer is apprised of the nature of his purchase.

The ordinance in question here lays down a stricter requirement than that provided for by the statute. And this ordinance applies to a drug not poisonous in small quantities but harmful only if taken in large doses.

In St. Louis v. King, 226 Mo. 334, the city of St. Louis had passed an ordinance preventing obscene advertisements and which went further than the statutes concerning such objectionable advertisements. After quoting the law upon the subject the court, at l. c. 347, said:

> "From these cases we deduce this principle, that although an act sought to be prohibited by city ordinance is vicious and properly within the power of a State Legislature to consider, it is not a proper subject for municipal legislation, unless the charter grants the power to the municipality. In the consideration of the validity or non-validity of this section 1447 of the municipal code, we are not called upon to consider the question of medical ethics, nor yet a question of private individual morals, but a question as to power and the scope of the grant of power by the State to the city of St. Louis, and unless authority can be found either in the express language of the charter or necessarily or fairly implied in the powers expressly granted or essential to the declared objects and purposes of the corporation, then the mere fact that it is aimed to prevent the practice of something that is immoral, or even which a State Legislature might punish, will not sustain the ordinance. The advertisement in question does not fall within the condemnation of sections 2176, 2177, and 2178, which have announced the legislative policy of this State with respect to objectionable advertisements and it is quite evident that the ordinance in this case goes further than this legislative enactment and does not fall within the express authority given by the charter and is not indispensably necessary to the powers therein expressly granted. * * *"

We believe the above quotation is especially applicable to the situation in this case, and, upon such authority, we hold that an ordinance such as the one in question is not within the power of the city of Cape Girardeau to pass. We wish to point out, however, that we do not pass upon the right of the State Legislature to enact such a law or to grant specifically such right to a municipal corporation.

CONCLUSION.

It is therefore, the opinion of this department that a city of the third class cannot pass an ordinance requiring sulfanilamide and barbiturates to be sold only upon the prescription of a physician or doctor.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

AO'K:CP

APPROVED:

COVELL R. HEWITT
(Acting Attorney-General)

CRIMINAL COSTS: Fees of state's witnesses should be paid by the state or county in a continuance where the costs are taxed against an insolvent defendant.

May 8, 1940

5-9

FILED
70

Honorable Jim Perrin
Circuit Clerk
Oregon County
Alton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated May 4, 1940, which is as follows:

> "We have a criminal case in this County wherein the defendant was granted a continuance in Circuit Court at his own cost. Later this defendant was convicted and taxed with all the cost in the case. As he was unable to pay same, he was placed in jail. Now as the County will have to pay the cost in this case, will it be necessary for them to pay the cost of the witnesses on the part of the State that occurred during the term said cause was continued by the defendant and at his cost.
>
> Your opinion on this matter will be appreciated.
>
> Also we have another case wherein the defendant was discharged with the understanding that he pay the cost. He is not able to do so and the state witnesses have not been paid. Is it now the duty of the County to pay these costs? There was no bond given in this case for the cost."

We will first take up the question of the liability of the county for the costs due the state's witnesses where a continuance was granted at the instance of the defendant, and the costs were taxed against him.

Section 3653, R. S. Mo. 1929, is as follows:

> "Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct."

This section was interpreted by the Kansas City Court of Appeals in State of Missouri v. Barker, 63 Mo. App. 535, to authorize a final judgment against the party requesting a continuance and the issuance of an execution thereon.

In State ex rel. v. Gordon, 254 Mo. 471, the state was granted a continuance, and the costs of such continuance were taxed against it. The defendant was sentenced to the penitentiary, and the state attempted to charge the costs of the continuance, at its request, against the defendant. The court, in denying the right of the state to collect such costs from the defendant, stated, l. c. 474, 475:

> "A somewhat opposite but very analogous situation to the one here involved was discussed in the case of State of Missouri v. William A. Brigham, 63 Mo. 258. In that case the defendant stood indicted for embezzlement and at one term of court, upon his application, the cause was continued at his costs and judgment rendered against him therefor, by virtue of the then existing statute that "Continuances, may be granted to either party in criminal cases for like causes and under

like circumstances as in civil cases.' At a subsequent term, defendant was tried and acquitted. Defendant then moved to set aside the judgment rendered against him for costs, at the prior term basing his contention upon the provision of Wagner's Statutes 1870, p. 349, sec. 4, which provided that 'in all capital cases and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the State.' (The same provision is now contained in section 5379, Revised Statutes 1909.) In refusing to allow defendant's contention the court, speaking through WAGNER, J., said:

'But this section only has reference to the costs that accrued at the trial which had not previously been specially adjudged against either party. If at a previous term there had been a judgment against the defendant for costs, they would not be comprehended within the intendment of the section. If there was any doubt about the legislative will in this regard, we think it is made perfectly plain by referring to the statute regulating criminal practice, which declares that, 'verdicts may be set aside and new trials awarded on the application of the defendant and continuances may be granted to either party, in criminal cases, for like causes and under like circumstances, as in civil cases. (Wagn. Stat. 1872, p. 1104, sec. 18.) This we think is decisive of the case and renders the question too plain to admit of or require argument.' (Id., l. c. 258-9.)"

However, the court in the same case indicated that where the costs of a continuance were taxed against an insolvent defendant, the state would be liable for the costs of its witnesses in the following language, l. c. 474:

> "In discussing the question we shall make no distinction between the costs incurred upon the part of the State and those incurred upon the part of the defendant, for the reason that it is not claimed that defendant is unable to pay the costs, but the decision of the question here involved will turn upon the construction to be given the foregoing statutes and more particularly on the construction to be given section 5203, supra." (Italics ours.)

Section 3827, R. S. Mo. 1929, provides:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

It will be noted that the only exceptions to the above provision for the payment of criminal costs, where the defendant is insolvent, are costs incurred on the part of the defendant. Where witnesses appear in obedience to a subpoena issued by the state, the cost of such appearance is incurred by the state, although such costs might be adjudged against a defendant.

We are of the opinion, therefore, that where the costs of a continuance are taxed against an insolvent defendant, even though such defendant be sentenced to imprisonment in the county jail, or to pay a fine, or

both, the county in which the indictment was found or information filed, should pay the costs of the state's witnesses for their attendance at the hearing where such continuance was granted.

Your second question was answered in an opinion rendered by this department to Mr. Elmer A. Strom, Prosecuting Attorney of Cape Girardeau County, at Jackson, Missouri, on January 26, 1939, a copy of which is enclosed herewith.

In a case where a dismissal is entered against a defendant, the costs are to be taxed as though there had been an acquittal, and a mere understanding with the defendant as to the payment of costs is not enforcable. The customary practice is to require the payment of costs by the defendant prior to dismissal.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC
Enc.

LIQUOR: Liquor control act does not apply to Federal Military Reservations.

January 18, 1940 1/20

FILED

Hon. Walker Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Att: W.H. Bouchard, Chief Auditor.

Dear Sir:

We have your recent letter which reads as follows:

> "We have a letter from the Railway Express Agency relative to the acceptance of intoxicating liquor consigned to Officers Clubs at Federal Military Reservations in the State of Missouri, which reads as follows:
>
> 'New York N.Y.
> November 25, 1939.
>
> Mr. J.J. West
> Superintendent
> Louisville, Ky.
>
> I have your letter of November 21st and enclosures regarding the acceptance of intoxicating liquor when consigned to Officers Clubs at Federal Military Reservations in the State of Missouri.
>
> Attorneys General of many states have ruled that the State Liquor Laws do not apply to shipments consigned to Officers Clubs located on Federal Military Reservations; Attorneys General of other States have ruled to the contrary.

It is my suggestion that we accept shipments consigned to consignees located on Federal Military Reservations in Missouri, and in the interim, it might be advisable to determine from the Liquor Control Board of the State of Missouri their ruling on the subject.

C.F. Messenkopf,
Traffic Manager.'

"Another question has arisen relative to the same shipments in regard to the state tax on all shipments to Military Reservations. We would like to have your opinion as to the legality of the Express Company delivering merchandise to the Reservations, who are not holders of state permits, for the sale of intoxicating liquor.

"We would also like to have your opinion as to the tax on such shipments. It is our understanding that the United States Treasury Department has ruled that the Reservations are not a part of any state and are under absolute control of the Federal Government, therefore, they are not subject to any tax levied by the states."

You have asked two questions which may be stated in the following language:

(1) Whether the liquor laws apply to Federal Military Reservations, and

(2) Whether the state liquor tax can be collected on all shipments of intoxicating liquor consigned to such reservations.

This office has in the past written two opinions regarding the applicability of state laws to Federal Military Reservations. The first one of these opinions was addressed to the Athletic Commission of the State of Missouri and dated November 5, 1937. This opinion holds that the State Athletic Commission has no jurisdiction whatsoever over boxing events held at Jefferson Barracks and that the State of Missouri cannot collect a 5% tax from the gate receipts of such exhibitions.

The second opinion is dated April 26, 1938, and is addressed to the Honorable Ray J. Cunningham, Chief Attorney, Veterans Administration, Jefferson Barracks, Missouri. We held in this opinion that the State of Missouri does not have such jurisdiction over the United States properties designated as Jefferson Barracks as will authorize it to impose the provisions of the Missouri Sales Tax Act on any sale of tangible personal property made at or on said premises.

We are attaching hereto copies of both of the above mentioned opinions.

The reasoning in the attached opinions is based on an act of the Missouri Legislature in 1892 (Laws of Missouri, 1892, Extra Session, page 16), by which the State of Missouri ceded to the United States the properties known as Jefferson Barracks. In this act, the State of Missouri reserved to itself only the right to serve, civil or criminal, process within said reservation in suits or prosecutions for or on account of rights acquired, obligations incurred or crimes committed in said state outside of the reservation.

The reasoning is also based on the provisions of the 17th clause of Section 8, Article I of the Constitution of the United States, which gives to Congress the power to exercise exclusive legislation in such reservations.

The reasoning is further based on Section 11072, Laws of Missouri, 1935, page 291, and Section 11073, R.S.

Missouri, 1929, by which the State of Missouri has consented to the acquisition by the United States, by purchase or grant, of any land in the state which has or might thereafter be acquired for the establishment or maintenance of governmental offices and has ceded jurisdiction to the United States over such properties. It appears, therefore, that under the Constitution of the United States and the laws of the State of Missouri that the state has no jurisdiction over legally established and operated Military Reservations, and that the Liquor Control Act does not apply to such territories any more than the Sales Tax Act or the laws governing athletic events; that none of the laws enacted by the state Legislature are applicable to such reservations. The lands included in military posts appear to come under the exclusive jurisdiction of the United States government.

CONCLUSION.

It is our conclusion, therefore, that none of the provisions of the Liquor Control Act of the State of Missouri apply to legally established and operated governmental Military Reservations and that no state tax can be collected on shipments of intoxicating liquor consigned to and for the purposes of being consumed on such reservations.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

LIQUOR BONDS: A new liquor bond cannot be required of a liquor dealer before resuming business after a suspension of his license unless a court has prior thereto declared the bond forfeited.

January 18, 1940

1-18

FILED
71

Hon. Walker Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your recent letter which reads in part as follows:

> "As a result of the opinion of the Supreme Court in the case of State of Missouri vs. Wipke and Reserve Mutual Casualty Company, I present this question:
>
> "Assuming that at a hearing before the Supervisor of Liquor Control there is substantial evidence that the permittee has violated a provision of the liquor law sufficiently to cause the Supervisor to suspend the operations under the permit, is it within the discretion of the Supervisor of Liquor Control to require of the permittee a new bond before he again undertakes the operations authorized by the permit?"

Section 13a of the Liquor Laws, Laws of Missouri, Extra Session 1933-34, page 82, provides that all dealers licensed to sell liquor by the drink for consumption on the premises where sold shall, in each instance, give a bond in the sum of $2,000.00. This section reads in part as follows:

> "In each instance, a bond in the sum of two thousand ($2,000.00) dollars, with sufficient surety, to be approved by the Supervisor of Liquor Control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, * * * ."

The bonds required of all other liquor dealers, that is, those who do not sell liquor by the drink for consumption on the premises, are provided for in Section 19 of the Liquor Laws, Laws of Missouri, Extra Session, 1933-34, page 83. This section reads in part as follows:

> "Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this act."

It will be observed in each of the above statutes that the Supervisor of Liquor Control shall require "a bond" from each applicant in the sum of $2,000.00. It does not appear that the Supervisor has been given any statutory right to exact more than one bond in connection with each license.

As to the powers and duties of a public officer, we find the following in 46 C.J. 1033:

> "Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity."

Therefore, since the powers of a public officer can be exercised only under the circumstances as prescribed by law, and since the Supervisor of Liquor Control is permitted only to require one bond in the sum of $2,000.00, it would appear that a second bond cannot be required of a dealer while the first bond is on file and in full force and effect unless the Supervisor has the power and authority to work an actual forfeiture of the first bond at the time he suspends the license.

We are convinced that he does not have this authority. The Legislature has never given the Supervisor either a direct or an implied right to forfeit such bonds. He is given the right to hear evidence on violations of the liquor laws by licensees, and can either revoke or suspend the licenses after a hearing. However, the Legislature has not said that his findings, as to whether the laws were violated or not, are sufficient in themselves to work a forfeiture.

This power to declare forfeitures appears to remain with the courts, and of course the courts may or may not see eye to eye with the Supervisor on the evidence presented. Suppose the Supervisor should find a licensee

guilty of a violation of law and, as a result, should suspend the license for a period of thirty days. Suppose, further, that a suit were brought on the bond in the circuit court to declare a forfeiture thereof and that the court should find that the licensee did not violate the law and that the bond should not be forfeited. It would follow, then, that the original bond had been at all times adequate and sufficient, and since the Supervisor has no authority to require two bonds in connection with one license, each in the sum of $2,000.00, his action in requiring the second bond under such circumstances would undoubtedly be a "nullity". It necessarily follows that an unforfeited bond is sufficient after the period of a suspension of a license to meet the requirements of the law, and it remains so until a forfeiture has been actually declared by a court of competent jurisdiction.

Since the Supreme Court of Missouri has handed down its recent decision in the case of State v. Wipke, 133 S.W. (2nd) 354, which involved a forfeiture of a liquor bond, it appears to be clear that the courts only can declare such forfeitures.

CONCLUSION.

We conclude, therefore, that a liquor licensee may resume the selling of intoxicating liquor after the period of any suspension given by the Supervisor of Liquor Control under the original bond on file with the Department of Liquor Control, provided the same has not prior thereto been declared to be forfeited by a court of competent jurisdiction.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

LIQUOR: Manufacturers of 5% beer who also sell as wholesalers must secure four licenses from Supervisor of Liquor Control.

February 5, 1940

2-4

FILED
71

Honorable Walker Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your recent letter which reads as follows:

"Some time ago I received the following letter from Mr. Mills, Secretary of the Anheuser-Bush, Inc.:

'I hand you herewith the following documents to be used in renewing our Wholesaler's license for the premises, 721 Pestalozzi Street, St. Louis, Missouri:

(1) Application as a wholesaler of intoxicating liquor containing not in excess of 5% alcohol by weight, for the period September 6, 1939 to September 6, 1940.

(2) Check in the amount of $50.00 payable to the Supervisor of Liquor Control, Jefferson City, Missouri, in payment of the fee for the above license.

(3) Bond in the penal sum of $2,000.00 to support the above license.

'In making the above application, I call your attention to the fact that we have not included in this application request for renewal of our Solicitor's license No. BS 264-A, which expires September 6, 1939. Our reason for not doing so is that Anheuser-

Busch, Inc., 721 Pestalozzi Street holds Solicitor's license BS-10 which will not expire until January 1, 1940. It would appear that Anheuser-Busch, Inc., as a brewer should obtain the following licenses in order that it might manufacture 5% beer and sell it to wholesalers and retailers:

TYPE OF LICENSE	AS DEFINED BY SECTION 21 OF THE LIQUOR CONTROL ACT.
Manufacturer's License	For the privilege of manufacturing and brewing in this state malt liquor containing not in excess of five (5%) per cent of alcohol by weight the sum of two hundred ($200.00) dollars;
Solicitor's License	For the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of malt liquor containing not in excess of five (5%) percent of alcohol by weight, to, by or through a duly licensed wholesaler within this state, the sum of fifty ($50.00) dollars;
Sholesaler's License	For the privilege of selling intoxicating liquor containing not in excess of five (5%) percent of alcohol by weight by a wholesaler to a person duly licensed to sell such malt liquor at retail, the sum of fifty ($50.00) dollars.

'The following licenses were issued to Anheuser-Busch, Inc., 721 Pestalozzi Street, St. Louis, Missouri, during the past year:

No.	TYPE OF LICENSE	FEE	
BM 1	Manufacturer	$200.00	Jan. 1, 1939 to Jan. 1, 1940
BS-10	Solicitor	50.00	Jan. 1, 1939 to Jan. 1, 1940
BW 226A	Wholesaler	50.00	Sep. 6, 1938 to Sep. 6, 1939
BS 264-A	Solicitor	50.00	Sep. 6, 1938 to Sep. 6, 1939

'It has always been my contention that we should not be required to obtain more than one (1) solicitor's license for Anheuser-Busch, Inc., at 721 Pestalozzi Street, St. Louis, Missouri. As you will recall, the requirement for a solicitor's license became effective in 1937 and we immediately obtained a solicitor's license which was issued for the period September 6, 1937 to September 6, 1938. On December 20, 1937, when we sought to renew our Manufacturer's license for the period January 1, 1938 to January 1, 1939, we wrote to the Department of Liquor Control, 1211-12 Mart Building, St. Louis, Missouri, submitting application accompanied by the $2,000.00 Bond and our check in the amount of $200.00 covering the fee for a Manufacturer's permit. My letter of transmittal included the following paragraph with respect to the Solicitor's license:

> "Inasmuch as we hold a Solicitor's license issued by the Department of Liquor Control of Missouri, for the period September 6, 1937, to September 6, 1938, the number of which is BS 130, we are applying at this time only for renewal of our permit to manufacture 5% beer, and have changed the application blank accordingly."

'On December 27, 1937 I received a reply from Mr. Richard F. Surkamp of the Department of Liquor Control, Jefferson City, Mo., advising that we must obtain <u>additional</u> Solicitor's license. I did not desire to delay the renewal of our Manufacturer's permit so we complied with the instructions as set out in the letter written by Mr. Surkamp. We have since that time obtained two Solicitor's licenses each year.

'However, I do not feel that there is anything in the Liquor Control Act to sustain the decision as set out in Mr. Surkamp's letter.

'If you agree with my contention, as to the above, it would appear that Anheuser-Busch, Inc., is entitled to a refund of $100.00 for the additional Solicitor's licenses which we obtained for two consecutive years acting on instructions issued by the Department of Liquor Control.

'When the new Wholesaler's license has been issued, please send it to me at this address.'

"You will observe that Mr. Mills asks a very disconcerting question and I am anxious to have your opinion. It is my view that it is necessary for Mr. Mills to have the license in question in order that there be no discrimination between his firm and the outside firms."

It appears that the Anheuser-Busch, Inc. is a manufacturer of beer and is also engaged in selling beer as a wholesaler to retail dealers. The question is then, how many licenses must the Anheuser-Busch, Inc. obtain from the Supervisor of Liquor Control to cover all of these activities?

Section 21 of the Liquor Control Act, Laws of Missouri, 1937 p. 529 provides for the several licenses required of liquor manufacturers and dealers. Confining the question to the manufacture and sale of malt liquor containing not in excess of five (5%) per cent of alcohol by weight, the portions of Section 21 are applicable as follows:

"(1) For the privilege of manufacturing and brewing in this state malt liquor containing not in excess of five (5%) per cent of alcohol by weight the sum of two hundred ($200.00) dollars * * * * * * * * * (2) For the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of malt liquor containing not in excess of five (5%) per cent of alcohol by weight, to, by or through a duly licensed wholesaler within this state, the sum of fifty ($50.00) dollars * * * * * * * * * * * (3) for the privilege of selling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight by a wholesaler to a person duly licensed to sell such malt liquor at retail the sum of fifty ($50.00) dollars. (numbering ours.)

The first part quoted above definitely requires a manufacturer's license, the cost of which is $200.00 annually. The second part provides for two different and separate licenses, each of which cost $50.00 annually. The first of these two is a manufacturer-solicitor's

license, which authorizes a manufacturer to solicit and sell to a person holding a wholesaler's license. The second license provided for in part two is a wholesaler-solicitor's license authorizing the wholesaler to solicit orders from the retailer. The third part provides for a wholesaler's license as such, at an annual cost of $50.00. Therefore, Anheuser-Busch Inc., must obtain four licenses under the setup you outline.

We are convinced that part two above does provide definitely for two separate and distinct solicitors' licenses. Suppose a manufacturer in this state should not be interested in, or have any connection whatsoever with any wholesale establishment. In order to solicit orders from independent wholesalers, the manufacturer would have to have two licenses, one to manufacturer and the other, under part two above a solicitor's license to solicit orders from duly licensed wholesalers. This manufacturer-solicitor's license would cost the manufacturer $50.00 annually. An independent wholesaler then must procure two licenses to enable him to sell and solicit orders from retail dealers. Part three above appears to require a wholesaler's license as such, and part two states that a wholesaler-solicitor's license must be obtained "for the privilege of * * soliciting orders * * by * * a duly licensed wholesaler within this state * *."

Therefore, since a manufacturer and wholesaler entirely independent of each other are required by Section 21 to secure four licenses, that is two licenses each, we do not think the legislature intended to discriminate in favor of the manufacturer and require one license less in the event the manufacturer also operated a wholesale business. In the case of the independent wholesaler, he would have no need whatsoever for a manufacturer-solicitor's license as is provided for also in part two. All such wholesaler would need is a wholesaler-solicitor's license also provided for by part two, which would enable him to solicit orders from the retail trade.

Section 21 provides further as follows:

> "Provided however, that a license authorizing the holder to sell to duly licensed wholesalers and to solicit orders for sale of intoxicating liquor, to, by or through a duly licensed wholesaler shall not entitle the holder thereof to sell within the State of Missouri, direct to retailers. Provided further, a wholesaler's license shall not authorize or entitle the holder thereof to sell to

> other wholesalers or to solicit orders for the sale of intoxicating liquors, to, by or through a duly licensed wholesaler, within this state."

In other words, a manufacturer cannot sell direct to retailers, but must confine his sales to wholesalers only. A manufacturer-solicitor's license as such, does not authorize anyone to sell direct to the retailer.

Section 30D of the Liquor Laws, Laws of Missouri, 1935, p. 278 then provides in part as follows:

> "It shall be unlawful for any person in this state holding a retail liquor license to purchase any intoxicating liquor except from, by or through a duly licensed wholesale liquor dealer in this state * * *"

In another communication from you, we are informed that the Department of Liquor Control, since its beginning has always construed Section 21 to require two licenses each from the manufacturer and wholesaler, and that such licenses have always been obtained by the dealers involved. As the Supreme Court of Missouri said in the case of In Re Bernays' Estate, 126 S. W. (2d) 209, l. c. 217:

> "It is true that the construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. * * * *"

CONCLUSION

A manufacturer of malt liquor containing not in excess of five (5%) per cent of alcohol by weight in this state who also is licensed as a wholesaler must annually obtain four licenses

from the Supervisor of Liquor Control. He must obtain a manufacturer's license, a manufacturer-solicitor's license, a wholesaler's license and a wholesaler-solicitor's license.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

JFA/ww

SHERIFFS: When entitled to commitment fees from county.

December 3, 1940

1-9

FILED
71

Hon. L. A. Pickard
Presiding Judge
Dunklin County
Kennett, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of November 27, 1940, as follows:

> "There has been some controversy over a period of months between this County Court and the Sheriff relative to the payment of commitment fees of $1.00 each on persons committed to the County Jail.
>
> "Some 18 months ago, auditors from the State Auditors Office, in checking the records of Dunklin County, advised the Court not to pay the monthly commitments which had been received by the Sheriff from County Revenue funds, claiming that these commitments were due to be filed in cost bills submitted to the Circuit Clerk for approval and payment by the State.
>
> "The Sheriff contends that many commitments are made in misdemeanors and

> investigations where cost bills do not originate and go up to the Circuit Clerk, and it is on such commitments as these that the Sheriff contends he should receive payment from the County Court from County Revenue.
>
> "For some 15 or 18 months, since being advised by the State auditors, this Court has declined to make payment to the Sheriff, and in as much as the present sheriff's term of office expires at the end of this year he is very anxious that disposal be made of his claims; therefore, we would like to have an opinion from you in detail, setting forth the position the County Court should take in this matter."

In determining those costs which are to be paid by the county, we should consider the following statutes:

Section 3825 R. S. Mo. 1929, which reads as follows:

> "Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 3827 R. S. Mo. 1929, as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

And, Section 3828 R. S. Mo. 1929, as follows:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

The term "costs" when found in the above statutes, would, in each instance, include the fee due the sheriff for committing the defendant to jail. Summarizing, the county should pay the sheriff's commitment fee in the following instances:

(1) When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs;

(2) in all cases where the defendant is acquitted, if the possible punishment which could have been inflicted included imprisonment in the county jail or a fine.

The above rules apply in either justice courts or courts of record. Before the county may pay criminal costs, in cases before justices of the peace, there must be a compliance with Section 3851 R. S. Mo. 1929, which is as follows:

> "Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Therefore, all fee bills for which the county could be liable must come from the office of the circuit clerk of this County, and be examined by the prosecuting attorney whether such fees were incurred in the justice courts or in the circuit court, and the court could not pay those costs mentioned in paragraph three of your letter where cost bills do not reach the office of the circuit clerk.

In no case could the county pay a commitment fee where suspects were picked up and no charges ever filed.

In connection with the above, we also wish to call your attention to Section 3510 R. S. Mo. 1929, which reads as follows:

> "When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case no otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

The prosecutor is required to endorse himself as a prosecuting witness in the following cases, as provided by Section 3542 R. S. Mo. 1929, which is as follows:

> "No indictment for any trespass against the person or property of another, not amounting to a felony,

> except for petit larceny, and no indictment for the disturbance of the peace of a person, or for libel or slander, shall be preferred unless the name of a prosecutor is indorsed as such thereon, thus: 'A B, prosecutor,' except where the same is preferred upon the information and testimony of one or more grand jurors, or of some public officer in the necessary discharge of his duty. If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs."

The liability of the county is briefly summarized in the case of State v. Williams, 92 Mo. App. 443, l. c. 450, as follows:

> "* * * The county is not liable in case of misdemeanor, unless the defendant be acquitted and there is no prosecutor who is liable for costs or in cases when the defendant is convicted and is unable to pay the cost. * * *"

CONCLUSION.

It is, therefore, the conclusion of this department that the county is liable for the sheriff's commitment fee in misdemeanor cases where the defendant

is acquitted and there is no prosecutor who is liable for costs, in cases where the defendant is convicted and is unable to pay the costs, and in cases where the defendant is acquitted, where the possible punishment is either confinement in the penitentiary or fine and imprisonment in the county jail.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

COUNTY HIGHWAY ENGINEER,
EX-OFFICIO:

In counties which have voted against the application therein of the provisions of Article 8, Chapter 42, R. S. Mo.,1929, as provided by secs. 8019 and 8020 thereof, the compensation of the ex-officio county highway engineer is governed by said sec. 8020, and the other provisions of said Article 8, including sec. 8011 R. S.'29 as amended L. 1939, P. 674 Mo. Stat.Ann.P.6829 do not apply.

February 13, 1940

2-14 FILED 72

Mr. Robert E. Powell
Macon County Surveyor
Excello, Missouri

Dear Sir:

This will acknowledge receipt of your letter dated February 7th, 1940, requesting our opinion in the following terms:

> "I would like to obtain some information or opinion concerning the ex-officio county highway engineer in counties with population of 20,000 which have voted under section #8019 to do away with the county highway engineer. Does the new section #8011 passed in 1939 legislature apply to counties that have done this?
>
> "Does the county court have the same power over the ex-officio county highway engineer as provided in section 8020 in regard to the days he is actually employed and the compensation he receives?"

Article 8, of Chapter 42 R. S. Missouri, 1929, including sections 8006 to 8023 inclusive, is entitled "County Highway Engineer, Appointment and Duties Of."

Section 8019 of said Article 8, provides for county elections "to determine whether or not the provisions of this article shall continue to apply to such county," and further provides in part that:

> "* * * if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Section 8020 of said Article 8, in part provides that:

> "* * * In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, * * * * ."

The two above quoted sections of said Article 8, provide for exceptions from the provisions of said Article 8.

Section 8011 of said Article 8, as amended, Laws of 1939, page 674, Mo. Stat. Ann., page 6829, does make a general provision regarding counties which "contain not less than 20,000 inhabitants or more than 50,000 inhabitants." However, said section 8011, and all other provisions of said Article 8, are subject to being suspended from enforcement as provided for by

sections 8019 and 8020 (Spurlock, Surveyor v. Wallace, et al, County Judges, 218 S. W. 890, 891, 204 Mo. App. 674.) Said section 8011 applies to counties which have not voted against the county highway engineer law.

CONCLUSION.

In counties which have voted against the application therein of the provisions of Article 8, Chapter 42, R. S. Missouri, 1929, as provided by sections 8019 and 8020 thereof, the compensation of the ex-officio county highway engineer is governed by said section 8020, and the other provisions of said Article 8, including section 8011 R. S. Missouri, 1929, as amended, Laws of Missouri, 1939, page 674, Mo. Stat. Ann., page 6829 do not apply.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

EH:RW

PUBLIC WAREHOUSES: Determination of Liability of Bondsmen.

4/13

April 2, 1940

FILED
72

Hon. H. Sam Priest,
Circuit Clerk,
Civil Courts Building,
St. Louis, Missouri

Dear Mr. Priest:

This will acknowledge receipt of your letter of March 21st, in which you quote a letter received by you, which is set out herein:

"As you know our Legislature recently enacted a 'revision act' in connection with our Statute covering operation of Public Warehouses, other than grain.

This revision act, which I understand became effective November 1st, 1939, accordance with the provisions in our statutes, relating to the effective dates of such acts.

This revision act very clearly and concisely states that all warehousemen must obtain a new license, which license shall expire on December 31st, next.

There is a question in my mind as to whether those who failed to comply with this new law were operating without any license at all, and leaving themselves open to the penalties provided in the law for failure to obtain the license, or whether it might be held that they were operating under their old license and bond, at least until they complied with the provisions of the new law.

As you know, the law was ingored by many warehousemen as respects to obtaining new license as of November 1st, and if it is presumed that their old license and bond were operative until December 31st, 1939, when many of them did come in and obtain new license and filed new bond or a legal liability policy, then it is reasonable to assume that the old bond is still in force especially as respects to those who have not taken out new license and filed new bond or legal liability policy.

In order words the new law either by its terms cancells the then existing license and its current bond as of November 1st, 1939, or it does not cancel it at all, either November 1st or December 31st, 1939.

While it is 'presumed' that the new law supercedes the old law and automatically cancells the then existing license which would correspondingly cancell the Bond as to subsequent acts of the principal.

In other words the bond covers a certain LICENSED principal, and does not cover a UNLICENSED principal.

It might be presumed that compliance with the new law by obtaining a new license and a new bond, automatically cancells all subsequent liability under the old license, but this is merely a presumption, because the new revision act does not state this to be a fact.

Therefore, the question I wish to determine is whether the old bond continues in force, and the warehouseman is operating under it (1) Where he has failed to obtain a new license, at all. (2) Whether he operated under the old license and bond, up to the date he complied with the revision act. (3)

Does the fact that the new act failed to specifically cancel the old license and Bond, leave the Surety open to liability until such time as their liability is cancelled by a SPECIFIC order of the Court."

And ask for an opinion as follows:

"As far as I am able to determine I feel that the provisions of the statutes relating to cancellation of liability of sureties must be complied with before such liability terminates, unless of course, the instrument has such termination date in its terms. In other words, I think that such specific orders of Court must be entered before such surety is relieved of further liability.

In view of the many inquiries that I have received on this subject, I would appreciate an opinion from you as to the matters set out in the above quoted letter, particularly in view of the fact that the inquiry therein contained substantially covers the question involved."

Sections 14352, 14353, 14354 and 14355, Chapter 137, R. S. 1929, provided that all warehouses in cities of over 50,000 population wherein other property than grain was stored for compensation should be public warehouses and prescribed the method of procuring a license; provided that bonds should be given by the licenses; and prohibited the operation of such warehouses without license or after the license had been revoked, or had become insufficient or void.

All of these requirements could be changed or revoked at any time.

"A licensed business or privilege, however, is subject to such reasonable regulations and restrictions as may be necessary for the protection of the public in general, or of persons dealing with the licensee."

C. J. Vol. 37, Par. 101, P. 343.

"The grant of the license is a mere naked privilege without consideration, and which the applicant may or may not avail himself of. Therefore, the state may revoke the privilege granted or may impose such conditions on its exercise as are deemed proper or demanded by the public interest."

Simmons v. State, 12 Mo. 269.

The General Assembly by Senate Bill 359, approved July 7, 1939, Laws of Missouri, 1939, pages 928, 929 and 930, repealed these four sections and enacted four new ones, to bear the same numbers. The new sections could not be considered a restatement of existing law as they change the classification of cities in which such warehouses shall be licensed and change the requirements for license, requiring annual application and annual bond.

The law authorizing the issuance of the license, requiring the bond and prescribing penalties for operating without a bond, having been repealed the liability on the bond should terminate.

"There is no question as to the law relied upon by appellants that, where a contract is entered into pursuant to a statute, such statute forms a part of the contract so as to be construed in connection therewith, Aetna Casualty & Surety Co. v. Henslee, 163 Ark. 494, 260 S. W. 414; but the statute under which the contract is made will not be construed as to enlarge the surety's liability beyond the terms of his contract, 50 C. J. 78; Milliron v. Dittman, 180 Cal. 443, 181 P. 779; C. H. Albers Commission Co. v. Spencer, 236 Mo. 608, 139 S. W. 321, Ann. Cas. 1912D, 705; Wood v. Fisk, 63 N. Y. 245, 20 Am. Rep. 528." 52 Fed. (2) l.c. 119.

CONCLUSION.

It is the conclusion of this Department that no order of court is necessary relieving the sureties on the bonds of warehousemen given in accordance with

the provisions of Section 14354; that there is no liability under the bonds for acts of the former principal subsequent to the date the repealing act took effect.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

WOJ:CP

CITIES: City council cannot lend surplus funds to school districts.

December 19, 1940

12-20

FILED
72

Mr. J. L. Prater
City Clerk
Calhoun, Missouri

Dear Sir:

We are in receipt of your letter of December 14, 1940, wherein you ask for an opinion upon the following statement of facts:

> "Our town is building a gymnasium and auditorium with W.P.A project, and the sponsers do not have enough money to put in a water system, showers and toilets. While our town has enough money in the treas u ry to buy the material.
>
> "Now we want to know if there is any legal way that the city council can loan the school board the money?
>
> "The school district is bonded to the limit now and the town does not owe any money at all and have enough revenue coming in to meet the current expenses. Please let me have a ruling on this at once."

We presume for the purpose of this opinion that Calhoun, Missouri, is a village or possibly a city of the fourth class; which ever one it is makes no difference as will be seen from the reading of this opinion.

It will be noted from reading the statutes that there does not appear a section which gives the city council the authority to loan its money to a school district. On the other hand, a school district can only

borrow money through its compliance with Sections 9225 and 9226, R. S. Missouri 1929, and Section 12, Article X of the Constitution of Missouri, as will be seen from a reading of the case of Strickler et al. v. Consolidated School Dist. No. 1 of Knox County, 291 S. W. 136, l. c. 138, where the court said:

> "Appellants insist that, if they cannot have a judgment for a money recovery, they ought at least to have a decree vesting them the title to the heating plant and the second story of the building, both of which were paid for with their funds, this on the equitable principle that one should not be permitted to be enriched at the expense of another. * * * * * * * * * * * * In taking their own funds and building the second story of the schoolhouse and installing a heating plant therein, if such they did, appellants were volunteers pure and simple, and it is well settled that a court of equity will not aid a mere volunteer. * * * * * * * * *

CONCLUSION

Therefore, in conclusion, it is our opinion that the town of Calhoun could not loan the money or neither could the school district borrow the same and create a legal liability on the district to repay said money.

Respectfully submitted

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

BRC:DA

BARBERS' BOARD OF EXAMINERS:
BRANCH OFFICES:

State Barber Board not authorized to rent branch offices.

January 30, 1940

1-31

FILED
73

Barbers' State Board of Examiners
State of Missouri
Hannibal, Missouri

Attention: Mr. Chas. F. Quinlin,
President.

Gentlemen:

This is in reply to yours of recent date requesting an opinion on the following statement of facts:

> "I am writing you in regards of Section 13524 in the State Barber Law. The Section reads, 'The Board shall annually elect from its member a president, secretary and treasurer. Shall have its headquarters at such place in the State as the Board may determine.'
>
> "We have our office in St. Louis and I would like to have an opinion from you if we are entitled to have branch offices in other cities, as there has been an office in Kansas City, which I have closed since I have been president of the Barber Board."

On the authority of the various boards and bureaus to enter into contracts and incur expenses against the State, I find that this department, on December 31, 1937, by an opinion written by Honorable Harry H. Kay, Assistant Attorney General, to Honorable Forrest Smith, State Auditor, went into this question and I am enclosing a copy of that opinion for your information. In that opinion it will be seen that a board or bureau must have statutory authority to incur such expenses as

you have mentioned in your letter and an appropriation therefor must also have been made. If such authority is not expressly granted, it cannot be implied unless it is evident from the language of the statutes that the proper exercising of the powers expressly granted would make certain other powers indispensible and the denial of such other powers (not expressly granted) would render ineffectual the powers expressly granted.

With the foregoing rules in mind we will refer to the statutes pertaining to the State Barbers' Board to ascertain what authority it has in reference to renting office quarters and branch office quarters.

Under Section 13524, page 250, Laws of Missouri 1939, it is provided in part as follows:

> "The board shall annually elect from its number a president, secretary and treasurer, shall have its headquarters at such place in the state as the board may determine; * * * * * * * * "

This section clearly indicates that the lawmakers have intended that the Barber Board have headquarters, but in searching through the laws pertaining to the Barber Board we do not find where the lawmakers have provided for or indicated that they intended that the Barber Board should have and maintain branch offices.

Section 13526, R. S. Missouri 1929, provides as follows:

> "Such board shall hold public examinations at least four times in each year, at such times and places as it may deem advisable, notice of such meetings to be given by publication thereof at least ten days prior to such meetings, in at least two newspapers published in this state, in the locality of each proposed meeting."

This section would indicate that it was intended that the Barber Board may hold examinations in other

places than at its headquarters, but we do not think that the Board, by authority given in this section, would be permitted to establish branch offices.

Looking to the appropriation act for the State Barbers' Board for 1939 to determine whether or not the lawmakers, by the appropriation, had any intention of providing for rent for branch offices, we find subsection D under the heading of Operation of Section 20 at page 112, Laws of Missouri 1939, provides as follows:

> "General expense; including communication, printing and binding, insurance and premium on bonds, travel and other general expense, and material and supplies consisting of stationery and office supplies ..... 17,000.00"

While the term" other general expense" in this appropriation act might include the expenses incurred in holding examinations at various places in the State, in the absence of statutory authority to rent branch offices, we do not think that the appropriation act could be considered broad enough to include the expenses necessary in renting and maintaining a branch office.

CONCLUSION.

From the foregoing it is the opinion of this department that the Barbers' State Board of Examiners are not authorized to maintain branch offices in the State and that the appropriation act for 1939 is not broad enough to include the expenses necessary for such maintenance.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

CITY COUNCILMEN:
SPECIAL ROAD DISTRICT: (1) In cities less than ten miles from county court councilmen cannot vote for road commissioner by proxy. (2) Councilmen and other officers may change vote for commissioner prior to final appointment by order of record.

February 8, 1940

2-8
FILED
73

Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

We acknowledge receipt of your letter requesting an opinion from this department, which reads as follows:

"On February 5, in accordance with Section 8026 R. S. Mo. 1929, the mayor and members of the city council of the City of DeSoto met with the county court at Hillsboro to elect a commissioner for the DeSoto Special Road District. The City of DeSoto is nine miles from Hillsboro, the county seat.

There we e two candidates for the position, namely Davidson and Lorenz. On the first ballot the vote was Davidson 6, Lorenz 6. However, one of the votes for Lorenz was a vote by proxy. The proxy vote was by a councilman who was ill and unable to attend. So you can see that without the proxy the vote would have been Davidson 6, Lorenz 5.

A second vote was then taken and on the second ballot the vote was Davidson 5, Lorenz 7, counting the proxy. Who was elected? Is the proxy a proper vote in this case?"

Section 8026, R. S. Mo. 1929, reads in part as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; * * * * * * * Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

From the above statute, it is plain that the mayor and members of the city council of a city within a special road district, organized under provisions of Article IX, Chapter 42, R. S. Mo. 1929, together with the members of the county court, at a meeting to be held in the county court room in February of each year, shall appoint a commissioner for three years by order of record to be kept by the county clerk. According to your letter at the meeting held at Hillsboro to elect a commissioner for the DeSoto special road district, a Mr. Davidson and a Mr. Lorenz received six votes each on the first ballot, but one of the votes for Lorenz was by proxy for a councilman, who was unable to attend.

46 C. J., Section 291, page 1033, states:

> "An officer, to whom a discretion is entrusted, cannot delegate the exercise thereof, * * "

It is plain that the officers in question, in selecting a commissioner, are exercising a discretion vested in them by law. Furthermore, Section 8026, supra, by providing a method for a member of the city council to vote by not being present when the city is located a greater distance than ten miles from the meeting place, clearly evidences a legislative intent that a councilman cannot vote unless he is present under any other circumstances. However, Section 8026, supra, does not provide for the election of a commissioner, but for his appointment by an order of record to be kept by the county clerk. When the judgment or discretion of an executive officer has been completely and finally exercised in the performance of the specific duty, the act performed is beyond his review or recall. 46 C. J. Section 292, page 1033. However, if such discretion is not completely and finally exercised, it necessarily follows that his acts can be reviewed and recalled. That Davidson was not finally appointed after the first ballot is evidenced by the fact that he was not appointed by order of record and entered by the county clerk, and that a second vote was taken.

It is evident from your letter on the second ballot one of those present changed his vote, as well as the proxy vote which gave Lorenz a majority without counting the proxy vote which, in our opinion, should not be counted. If the majority so voting for Lorenz caused such appointment to be made of record by the county clerk, then we think action was final and that Lorenz was legally appointed as commissioner. If the appointment has not been finally completed by an order of record as required by Section 8026, supra, we suggest that another meeting could be held to appoint a commissioner within the terms of Section 8026 in the manner outlined above.

CONCLUSION

In view of the above, it is the opinion of this department that a councilman of a city in a special road district, when such city is not located at a greater distance than ten miles from the meeting place of the county court, can not vote for a road commissioner by proxy.

It is our further opinion, under the facts stated in your letter, that Davidson, although he had a majority of those present on the first ballot, was not finally appointed commissioner, within the meaning of Section 8026, unless his appointment was entered of record by the county clerk before the officers there present changed their votes.

It is the further opinion of this office that Lorenz was appointed if a majority of those present voted for him and caused the appointment to be entered of record by the county clerk. If the appointment has not been finally completed by an order of record, then a majority of those present and entitled to appoint may still appoint a commissioner as provided in Section 8026, supra.

Very truly yours,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RT

MUNICIPAL CORPORATIONS: City of Fourth Class may enact an ordinance prohibiting gravel pits in the city limits which endanger the safety and health of the citizens of the city.

May 20, 1940

5-77

FILED
75

Hon. Theodore R. Riefling
Mayor
Valley Park, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 17th, 1940, which reads as follows:

"The Rock Hill Stone & Gravel Company of Rock Hill, Missouri has come before our Board of Aldermen to secure a building permit to build a building on property which they acquired through tax sale, situated in the City of Valley Park on the Meramec River. The building we well know would be used in digging of gravel to a great depth which would endanger the property of other citizens who have residences and club houses on the river. This property is situated so as if a large excavation were made there would be a strip of land owned by others which would have the Meramec River on one side and a large lake on the other, thereby endangering their property by an underflow from the lake to the river. The Board of Aldermen did not refuse a permit but delayed the issue until the next board meeting so as to give the citizens time to present evidence that

the digging would endanger their property.

"A committee appointed by the Mayor to investigate the situation reported that the digging operations would be detrimental to the property owners.

"The digging of gravel would be at a tremendous rate over a short period of years and when completed would leave a large lake which would be of no use to anyone except as a breeding place of mosquitoes and other vermin.

"We would like to know if the City could prevent these operations by passing and ordinance prohibiting digging of sand and gravel on property within the City Limits. Are we within our rights in refusing them a building permit which would endanger the property of others."

Under the 1930 Federal census the population of the city of Valley Park was 1,772. I am presuming that the city of Valley Park is a city of the fourth class.

Under Section 6093 R. S. Missouri, 1929, cities of the population of not less than five hundred and less than three thousand are classified as cities of the fourth class.

Article 8, Chapter 38, R. S. Missouri, 1929, applies to cities of the fourth class and Section 7018 of Article 8, reads as follows:

> "The mayor and board of aldermen of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Under the above section cities of the fourth class may enact ordinances that are not repugnant to the Constitution and the laws of this State which are beneficial to the health of the inhabitants.

In the case of Bellerive Inv. Co. v. Kansas City, 13 S. W. (2d) 628, l.c. 635, the court in upholding a city ordinance of Kansas City in reference to the fire protection in the Bellerive Hotel, said:

> "In the Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 62 (21 L. Ed. 394), Mr. Justice Miller said, in discussing the sources and extent of the police power: '"Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the build-

ing with combustible materials, and the burial of the dead, may all," says Chancellor Kent (2 Commentaries, 340), "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the

perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."'

"Nor does the mere fact that the ordinance, in section 2 thereof, prescribes only a pecuniary penalty, by way of a fine to be assessed against a violator of its provisions, render the ordinance any other than a police regulation, referable to the police power of the municipality. The power to punish by pecuniary penalty or fine is generally held to to be implied from the power to enact police ordinances or regulations. 43 C. J. 265; St. Louis v. Sternberg, 69 Mo. 289, 302; St. Louis v. Green, 70 Mo. 562. Consequently, it cannot well be said, we think, that the ordinance in controversy is any the less referable to the police power of the municipality because it does not specifically declare the subject-matter of the ordinance to be a nuisance, and does not provide for the abatement thereof, but merely prescribes a pecuniary penalty or fine for violation of the requirements and regulatory provisions of the ordinance.

"The jurisprudence of this state abounds with decisions wherein statutes and ordinances have been held to be fairly referable to the police power of the state or the municipality, and therefore have been held not to invade or transgress the constitutional rights and guaranties of persons, natural or corporate, charged with the violation of such statutes and ordinances. * * * * * "

The court further said at l. c. 639:

"It may be that an ordinance which attempts to inhibit the keeping or storing of any class of specified things in a considerable number or amount in any place or establishment whatsoever might properly be subject to the merited contention and claim that it is unreasonable and arbitrary in its effect and application, but, where the inhibition against the keeping or storing of the class of specified things is limited by the terms of the ordinance (as in the instant case) to a place underneath any room, place or establishment used, occupied or let for living or sleeping quarters, then the ordinance is to be viewed and construed in an entirely different light, and whether the ordinance is unreasonable and purely arbitrary in its effect and application depends upon the purpose and object of its enactment, and the dangers and hazards to society or humanity at large at which it is directed, as disclosed either upon the face of the ordinance, or by evidence aliunde. 43 C. J. 312; City of Windsor v. Bast (Mo. App.) 199 S. W. 722; Cusack Co. v. Chicago, 267 Ill. 344, 349, 108 N. E. 340, Ann. Cas. 1916C, 488. In other words, the reasonableness or unreasonableness of an ordinance is to be determined from the whole and entire terms and provisions of the ordinance in the light of the evils, dangers, or hazards at which it is aimed and directed. As

> is said in 43 C. J. 308: 'The courts will have regard to all the circumstances and subjects sought to be attained, and the necessity which exists for the regulation.'
> * * * "

The main question of ordinances in regard to health and safety depends upon the reasonableness of the ordinance and further depends upon the facts in the case. Unreasonable ordinances are subject to attack, but, under the facts set out in your case we do not believe that an ordinance enacted to protect the health of the community would be considered unreasonable. Also, in the case of State v. McKelvey, 256 S. W. 489, l.c. 495, which was an appeal on a fine for violating a zoning ordinance by having a junk yard in violation of the city ordinance of the city of St. Louis, the court held the ordinance under the facts in the case were unreasonable and deprived the use of defendant's property without compensation or due process of law. The court in that case stated as follows:

> "* * * It is clear that the exercise of the police power in reference to private occupations is limited to such regulations as may be reasonably necessary for the protection of the peace, health, and comfort of society. Livery stables, dairies, laundries, soap and glue factories-- in short, all trades and occupations prejudicial to the health, morals, and good government of the citizens may be restricted. But in all cases whether the business or occupation is a nuisance or not is a question of fact. Regulations based

> on aesthetic considerations are not in accord with the spirit of our democratic institutions. It must be assumed that defendants conducted their business in accordance with the ordinance regulating dealers in junk. That is necessarily conceded by appellant's contention that it is unlawful because it is prohibited.
>
> "'The owners of city lots or other property in a city may keep them and use them as they wish, free from interference on the part of the municipality, provided that in so doing they do not create and maintain a nuisance or cause inconvenience, damage or harm to others.' 28 Cyc. 735.
> * * * "

In all of the cases the validity of the ordinances depended upon the reasonableness of the ordinance and the facts under which the ordinance was enacted.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that an ordinance would be valid which would prohibit the digging of gravel to a great depth which would endanger the health of the citizens of the city of Valley Park.

We are basing this opinion on the fact that you state that the pit remaining after the gravel is removed would leave a large lake which would be of no use to

anyone except as a breeding place of mosquitoes and other vermin.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

MOTOR CARRIERS

PUBLIC SERVICE COM.

Public Service Commission without authority to require foreign interstate carriers to comply with license section relating to foreign corporations doing business within state.

1-23

January 20, 1940.

FILED 76

Mr. Daniel C. Rogers
Assistant Counsel
Public Service Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads as follows:

"Rule No. 4-(g), promulgated by the Public Service Commission and appearing in General Order No. 33-A, effective September 17, 1938, provides that if any motor carrier or contract hauler, making application to the Public Service Commission for authority to use the public highways of the State of Missouri, is a foreign corporation,

> '..... it shall present with the application evidence of its authority to transact business in the State of Missouri; ..... '

"A certain foreign corporation, which has filed its application for authority to operate upon the public highways of Missouri, has taken the position that, inasmuch as its proposed use of the public highways of Missouri will be strictly limited to interstate commerce, the Commission has no authority to require it to comply with Sections 4596, 4597, 4598 and 4599 of the Missouri Statutes. Applicant suggests that, inasmuch as the freight which it would haul to Missouri destinations originates in another State and the

freight which it would pick up at Missouri points of origin would be destined to points in other States, it is engaged exclusively in interstate commerce, and hence is not subject to the above provisions of the statute.

"The Commission, believing that the requirement of Rule No. 4-(g), above quoted is a beneficial one in its program of administering the Missouri Bus and Truck Laws, Laws of Missouri, 1931, pages 304-316, inclusive, as amended, contends it has authority to promulgate the rule mentioned.

"For example, Section 5267-(b) of the aforesaid Bus and Truck Law provides:

> '(b) The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined.'

"Other provisions of the law indicate a legislative intent to give the Commission rather broad discretionary powers in promulgating rules necessary to carry out effectively the purposes of the Act."

Whenever authorized by the legislature the right of certain officers, boards and commissions to promulgate rules and regulations has always been recognized as the general proposition of law. State ex rel. Field et al. v. Smith et al. 49 S. W. (2d) 74, Sawyer v. United States 10 Federal (2d) 416, Ex Parte Cavanaugh v. Gerk, 313 Mo. 375. While this observation may be said to be axomatic it does not necessarily follow, where the right is given that such right may be used

to change the law itself. This has been pointed out in the case of Sawyer v. United States, supra, at page 420, as follows:

> "Authority to make rules and regulations necessary for carrying out the purposes of a legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right given by the act. The Congress cannot delegate legislative power. That it cannot do so is universely recognized as a vital principle of our system of government under the Constitution. Field v. Clark, 143 U. S. 649, 692, 694, 12 S. Ct. 495, 36 L. Ed. 294. But the authority to make administrative rules is not a delegation of legislative power, and to deny the right of Congress to authorize a department of the government to establish administrative rules which shall have the force of law, as Mr. Justice Harlan said in Union Bridge Co. v. United States, 204 U. S. 364, 387, 27 S. Ct. 367, 374, (51 L. Ed. 523), "would be 'to stop the wheels of government.' " See, also, United States v. Grimaud, 220 U. S. 506, 519, 520, 31 S. Ct. 480, 55 L. Ed. 563. It is also undoubted that no "regulation" made by a department of the government under authority so conferred by an act of Congress can alter or amend the law, and that all that can be done is to regulate the mode of carrying into effect that which Congress has enacted."

The object and purpose we believe underlying the giving of such power to prescribe rules and regulations is aptly stated in the case State ex rel.

Field v. Smith, supra, at page 76, wherein the Supreme Court of Missouri observed:

> "The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

From these considerations it is to be seen that certain details regarding the enforcement of any laws may be left to administrative officers. As was stated in the case Ex Parte Cavanaugh, supra, at page 380.

> "It may empower certain officers, boards and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms and may define certain areas within which certain regulations may be imposed, and it may empower a board or a counsel to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area."

To illustrate we direct your attention to subdivision (d) of Section 5268, R. S. Mo. 1929, as amended, Laws of Missouri, at page 309, pertinent to your inquiry, wherein the legislature has expressly provided,

> "The commission shall adopt rules prescribing the manner and form in which motor carriers shall apply for certificates and permits required by this act. Among other rules adopted, there shall be rules as follows: (1) Application shall be in writing. (2) Shall contain full information concerning the ownership, financial condition, equipment to be used and the physical property of the applicant. (3) The complete route over which the applicant desires to operate or the territory which applicant desires to serve. (4) The proposed rates, schedule, or schedules, or time cards of the applicant."

It will be noticed that this portion of the statute makes it mandatory on the Commission to promulgate rules and regulations governing the particular subject matter.

With these observations we come to your precise question: has the commission exceeded the power granted to make rules and regulations for the enforcement of Section 5268, supra,? We think so.

Attention is directed to Section 5268, supra, subdivision (b), reading as follows:

> "It is hereby declared unlawful for any motor carrier except as provided in Section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. The commission upon the filing of a petition for an interstate permit shall within a reasonable time fix a time and place for a hearing thereon.

> The commission shall cause a copy of such petition and notice of hearing thereon to be served upon the secretary of the state highway commission and upon the proper officer of each municipality maintaining the highway over which proposed interstate permit is desired, and each party so notified is hereby declared to be an interested party to said proceeding and may offer testimony as to the use and regulation of that partof said highway coming under its maintenance and police regulation. In determining whether or not a permit should be issued, the commission shall give consideration to the kind and character of vehicles permitted over said highway and shall require the filing of a liability insurance policy or bond in some insurance company, association, or other insurer authorized to transact insurance business in this state, in such sum and upon such conditions as the commission may deem necessary to adequately protect the interest of the public in its use of the highway, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons or loss of or damage to property resulting from the negligent operation of such interstate motor carriers."

This section of the statute we believe is plain and without ambiguity, therefore no room for construction exists. It is clearly within the power of the legislature to enact. Atlantic Pacific Stages Incorporated v. Stahl 36 Federal (2) 260 (1929). Since the legislature has enacted this section of the statute, is it not reasonable to assume, that the legislature deemed that the requirements therein imposed were sufficient for the regulation of carriers engaged exclusively in interstate commerce? We

think so. This is because had the legislature the power to require a foreign carrier to comply with Sections 4596, 4597, 4598, 4599, R. S. Mo. 1929, relating to the licensing of foreign corporations that such would have been done. Since it was not done, it is believed that the legislature was fully aware of what requirements could be imposed upon interstate carriers so as to not burden interstate commerce. This observation is fortified by the decision of the Supreme Court of Missouri, in the case of International Text Book Company v. Gillespie 229 Mo. 397. In that case it was expressly held that to require a foreign corporation engaged exclusively in interstate commerce to comply with the sections of the statute, which the commission now seeks to require of foreign interstate carriers, would amount to a burden upon interstate commerce and therefore violate the Constitution of the United States.

We note particularly from your request for an opinion that other provisions of the act seem to indicate a legislative intention to give the commission broad discretionary power respecting the promulgation of rules necessary to effectively carry out the provisions of the act. This is true. On the other hand it is not believed that at the power asserted by the rules and regulations presently promulgated can be said to have been promulgated for the purpose of enforcing the provisions of the act. Clearly to us the rule promulgated is but an additional requirement, and not made for the purpose of enforcing the provisions of the act. We believe an analysis of subdivision (b) 5268, clearly supports this view.

CONCLUSION

In view of the above, it is the opinion of this department that the rule promulgated by the Public Service Commission requiring foreign corporations engaged exclusively in interstate commerce to comply with Sections 4596, 4597, 4598, 4599, R. S. Mo. 1929, is invalid, because in excess of the power granted by the legislature to make rules and regulations.

Respectfully submitted,

APPROVED:

RUSSELL C. STONE
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

RCS/mc

Municipalities: Richmond Heights under 1940 Census entitled to three councilmen. How appointed and term.

August 20, 1940

4-26

FILED
76

Mr. L. R. Robertson
City Counselor
Richmond Heights, Missouri

Dear Sir:

Your letter of July 1, 1940, presents to us the following facts: Richmond Heights is a city of the third class with alternative form of government. Its legislative body now consists of a Mayor and two Councilmen. According to preliminary reports on the 1940 United States Census, said city now has a population in excess of 12,000.

Upon these facts you ask: Is Richmond Heights now entitled to another Councilman, and, if so, the method by which he is to be selected?

The answer to this question depends upon several points which we now consider.

Section 6909 as amended Laws 1939, P. 541, apportions the number of councilmen cities of this class shall have on population brackets. For a city having a population of 12,000 and less than 20,000 there is provided a Mayor and three Councilmen.

The first point is: May the preliminary Census report be relied upon to authorize the city to have three Councilmen? We are of the opinion it can be.

In Kay v. Moniteau County, 134 S. W. (2d) 81 (Mo. Sup.) the Court said this, concerning the effective date of the 1930 Federal Census, l. c. 83:

> "* * * Clearly the event which terminated the multiplication of votes method as a basis for fixing salaries occurred when the census was available. * * *"

See also Carter County v. Huett, 259 S. W. 1057 (Mo. Sup.).

In Ervin v. State, 44 S. W. (2d) 380 (Tex.) the question involved was whether or not a jury had been properly selected, due to a population change that made other provisions of the law apply. The Court considered the point at length, stating, l. c. 381:

> "There is no specific provision in the Act of Congress June 18, 1929 (13 USCA Sec. 201 et seq.), with reference to the time of final announcement of the census; nor is there any provision as to the time the census shall become effective. Under the terms of the Act of Congress March 6, 1902, Sec. 11 (13 USCA Sec. 4), the Director of the Census is required 'to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law.' Substantially to the same effect is Section 13, Act of Congress June 18, 1929 (13 USCA Sec. 213), which imposes on the Director the duty to have printed preliminary and other census bulletins and final reports of the results of the several investigations. Section 205, 13 USCA reads as follows: 'Each supervisor shall perform such duties as may be imposed upon him by the Director of the Census in the enforcement of this chapter,' etc.
>
> "In Holcomb et al. v. Spikes, 232 S. W. 891, 894, the Court of Civil Appeals at Amarillo, Tex., in holding that a preliminary announcement of the census by the Director was an official pronouncement of which the

public and all officials may take notice, said: 'It would seem by the act of 1902 duties were imposed upon the Director to publish and distribute bulletins and reports of the preliminary and other results of the various investigations authorized by law. This, in so far as we can ascertain, is the only method to inform the public and of giving it access to the information ascertained and compiled by the enumerators and supervisors. It would seem when bulletin is so published and distributed it then becomes an official pronouncement under the law, of which the public and all officials may take notice. * * * In this case the undisputed facts show the Census Bureau, under the signature of its Director, issued a bulletin showing before the election the population of Lubbock County to be 11,096. This seems to have been official. This information appears to have been given to leading papers of the state. Under the law this information could have been obtained in no other way than through the Director's official act, without violating the law and subjecting the parties to a charge of felony. We think the case of Nelson v. Edwards, 55 Tex. 389, indicates, when the enumerators' list is filed, as required by the law, as it then existed, this made it such evidence as that public officials could and should act upon it. There was no other method provided, or shown requiring a proclamation placing the census in effect.'

"In the case at bar, the preliminary announcement of the census contained a statement that the figures were preliminary and subject to correction. Touching the effect of this statement, we quote further from the opinion in Holcomb et al. v. Spikes, supra, as follows: 'It is insisted that the Director of Census

gave a certificate to the effect that the count for the census was subject to correction. If this certificate was authorized by the act, we do not believe it should be held that this evidenced that the census was not complete under the terms of the law when the Director had officially published and distributed bulletins that the population was over 10,000. It is not a fact that the official count was incomplete or was not correct. In fact, his subsequent certificate shows it was correct, and that his bulletin had been properly issued. The bulletin, we believe, officially announced the population as shown by the list forwarded by the enumerators of Lubbock county and supervisors of the district, and that as filed in the archives of the census office it was open to the public. The statute authorized, if there was an incomplete or erroneous enumeration, that it could be amended or taken anew. The bulletin does not indicate that it was incomplete or negligently done, but rather indicates it may be subject to correction. It does not carry the idea that it was incomplete, but that it was complete. We think, when the bulletin was given to the public, officials who were required to act with reference thereto may take official notice that the enumeration had been made and was then in the archives of that office, subject to the inspection of the public in which the population of Lubbock county had been determined. The fact that it may be corrected does not indicate that the census was not complete and then a public document under the law.'

"In the case of Herndon v. Excise Board of Garfield County et al., 147 Okl. 126, 295 P. 223, 224, the Supreme Court of Oklahoma had under consideration the question as to whether a preliminary announcement of the census of Enid, Okl., by the supervisor of the district embracing said city was binding upon officials who were required to act with reference to the population of said city. The case of Holcomb et al. v. Spikes, supra, was cited in support of the conclusion that the preliminary announcement was an official pronouncement of which the public and all officials took notice and by which officials who were required to act in reference to the population therein stated should be guided. After citing the statutes relating to the duties of the Director of the Census and his supervisors, the court said: 'Thus it follows that the supervisor was clothed with authority to perform the duties imposed upon him by the Director of the Census, one of which duties was the preliminary announcement of the census involved in the case at bar. So then the preliminary announcement of May 3, 1930, was an official announcement of the census of Enid; moreover, the certificate of the Director of the Census, dated September 22, 1930, showing a population of 26,398, was official even if not final. It follows that the city of Enid fell into the classification contained in section 4691, C. O. S. 1921, providing for said court.'

"It appears that the statutes of Oklahoma provided for a city court in cities having a population of more than 25,000 and less than 55,000, as shown by the

> last federal census. The preliminary announcement of the population of Enid was held to automatically bring said city within the operation of the statute. See, also, State v. Braskamp, 87 Iowa, 588, 54 N. W. 532.
>
> "The opinion is expressed that the preliminary announcement of the census of the city of Abilene was an official pronouncement. This announcement was made prior to the time the jury commissioners selected the panel from which the jury was drawn. The announcement of the population in the preliminary report should have been the guide of officials whose duty it was to act with reference thereto. The effect of the preliminary announcement was to place the county of the prosecution under the provisions of article 2094, Revised Statutes 1925, as amended. * * *"

For other cases to the same effect see: Board of Com'rs. of Coal County v. Mathews, 296 P. 481 (Okl.); Elliott v. State ex rel. Kirkpatrick, 1 P. (2d) 370 (Okl.) and Underwood v. Hickman, 39 S. W. (2d) 1034 (Tenn.).

In the last cited case, the Court had before it a question of salary change due to a different population classification arising from the 1930 Federal Census. The Court stated, l. c. 1034:

> "The census of 1930 was taken pursuant to Chapter 28, Acts of Congress of 1929 (13 USCA Secs. 201-219).
>
> "By section 1 (13 USCA Sec. 201) it is provided that a census population shall be taken by the Director of the Census in the year 1930 and every ten years thereafter.

"By section 2 (13 USCA Sec. 202) it is provided: 'The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period.'

"By section 6 (13 USCA Sec. 206) it is provided that the census of the population shall be taken as of the 1st day of April, and it is made the duty of each enumerator to commence the enumeration of his district on the day following, unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event, it shall be the duty of each enumerator to prepare the returns and forward same to the supervisor of his district within thirty days from the commencement of the enumeration.

"By section 13 (13 USCA Sec. 213) the Director of the Census is authorized to have printed by the Public Printer, in such editions as he may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this statute, and to publish and distribute said bulletins and reports.

"By section 18 (13 USCA Sec. 218) the Director of the Census is authorized at his discretion, upon the written request of the Governor of any state or territory or a court of record, to furnish such Governor or court of record

> with certified copies of so much of the population returns as may be requested, upon the payment of the actual cost of making such copies and $1 additional for certification.
>
> "From the foregoing, it will be observed that the census shall be taken as of April 1st, that the Director is given three years to complete his report, but is authorized to make preliminary reports from time to time. No specific provision is made for publishing official reports, and the statute does not fix a definite date when the new census becomes effective. The only logical conclusion is that it becomes effective on April 1st, and such, in our opinion, was the intention of Congress. Should we adopt any other date, it would result in irregularity and nonuniformity. For example, two counties could be raised by the same census to another class; the population of one might be officially determined on July 1st and the other on October 1st, so that in the one county the clerk would begin drawing the increased salary three months before the clerk in the other county would be entitled to the additional compensation. Theoretically, at least, they are entitled to the same compensation, and to construe the law as contended by complainants would result in inequality and injustice."

Our examination of the recent amendments to the Federal Census Act (13 USCA 201 et seq.) does not disclose any change that would affect the conclusions reached in the above cases. Further, the argument advanced in Underwood v. Hickman, 39 S. W. (2d) 1034, seems to be sanctioned by the Court in this state in Kay v. Moniteau County, 134 S. W. (2d) 81. It was there contended that the census did not become effective until the county court received an official certification from the Director of Census. In answer to this, the Court said, l. c. 83:

> "* * * If the section were to be interpreted as contended for by plaintiff then one county, by acquiring a certification of the population immediately when available, would be paying salaries on the census basis and another county in the same classification, which had not obtained such certification, would be using the other method. This would destroy the uniformity of the law and such was never intended. * * *"

In our opinion the census for the year 1940 was "available" immediately upon its publication or pronouncement to the public by the Director or his subordinates. That this pronouncement is an official one must be assumed, since to rule otherwise would be to accuse those who made the release of violating the law. Only the Director of Census is authorized to make an announcement (13 USCA 213) and each supervisor can only do that which he is directed to do by the Director (13 USCA 205, 208).

The adoption of this position might at first blush appear to run counter to the uniformity requirement laid down in Kay v. Moniteau County, supra, but it is not so when we consider that the census, relates back to, and is taken so as to reflect the population as of April 1, 1940 (13 USCA 206). It does not even purport to reflect the population as of the date the announcement is made by the Director.

The wording of the particular act with which we are concerned does not limit the application of the new census until "ascertained" by the Director. It provides three councilmen for cities of that class, "having a population of twelve and less than twenty thousand". While the 1940 census does not purport to give the population of Richmond Heights now or in the future, it is the count for the next ten years unless the city desires to take its own census (Section 7256 R. S. Mo. 1929). Certainly Richmond Heights had such a population on April 1, 1940 and was so found to have by the Director of Cen-

sus in an official announcement. Said city is therefore entitled to another Councilman.

The next question: Is there a vacancy existing in the office of Councilman in said city?

In State ex rel. Brown v. McMillan, 108 Mo. 153, 159, it is said:

> "* * * We think that both authority and the spirit of our institutions favor the view that when an office is created, and no restrictions for filling the vacancy are imposed, a vacancy arises ipso facto.
>
> "'The word "vacancy" aptly and fitly describes the condition of an office when it is first created, and has been filled by no incumbent.' Walsh v. Commonwealth, 89 Penn. St. 426. In State ex rel. v. Askew, 48 Ark. 89, the supreme court of that state said: 'Vacancy is the state of being empty or unfilled. Vacant lands are unoccupied lands. Vacant house is an untenanted house. A vacant office is an office without an incumbent; and it can make no difference whether the office be a new or an old one. An old office is vacated by death, resignation or removal. An office newly created becomes ipso facto vacant in its creation.' And in State ex rel. v. County Court, 50 Mo. 317, Judge ADAMS speaking for the court said, 'This is a new office created by this act and ipso facto becomes vacant in its creation.' Rhodes v. Hampton, 101 N. C. 629; Stocking v. State, 7 Ind. 326."

See also State ex inf. Hadley v. Burkhead, 187 Mo. 14, 35 and State ex rel. Buskirk v. Boecker, 56 Mo. 17, 21, where it is held that a newly created office ipso facto becomes vacant on its creation.

Section 6909, Laws 1939, p. 541, creates the three offices of Councilmen in certain cities of the required population, therefore, Richmond Heights, meeting the population requirements of the act, now has a vacancy existing in one of these offices.

Section 6909, supra, provides:

> "* * * If any vacancy occurs in such office, the remaining members of said council shall appoint a person to fill such vacancy during the balance of the unexpired term. * * *"

That provision is clear and no comment is needed, however, the act is not so clear as to the length of the unexpired term for which the appointment is made.

Section 6909, supra, provides:

> "In every such city there shall be elected at the first regular municipal election held after the taking effect of this act, and every four years thereafter, a mayor and (the proper number of) councilman * * *."

Section 6721 R. S. Mo. 1929 provides:

> "A general election for the elective officers of each city of the third class shall be held on the first Tuesday in April after the organization of such city under the provisions of this article, and every two years thereafter, * * *"

We are not advised when Richmond Heights was organized and cannot state when the term of this appointee will expire, but due to the further provision of Section 6909, supra, that appointee will only serve until the next regular election in said city. That arises from this provision of the statute:

> "* * * The terms of office of the mayor and councilmen or aldermen in such city in office at the beginning of the terms of office of the mayor and councilmen first elected under the provisions of this section shall then cease and determine * * *."

The term of the Councilman appointed to fill this vacancy will end, like the terms of the Mayor and other two Councilmen, at the commencement of the terms of the Mayor and three councilmen elected at the first election held after the effective date of Section 6909, Laws 1939, p. 541. The effective date of this section was November 1, 1939 (Section 659c, Laws 1939, p. 478).

CONCLUSION.

It therefore is our opinion that Richmond Heights is now entitled to three Councilmen; that there exists a vacancy in one of said offices which vacancy is to be filled by appointment by the remaining member of the Council; and that the person so appointed shall serve until the next regular city election occurring after the effective date of Section 6909, Laws 1939, p. 541.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

LLB:CP

COUNTY BUDGET ACT: County clerk may purchase office machines and other supplies not of an expendable nature provided costs were included in his budget and approved by county court. The purchase should be made out of the funds of class 6; funds can only be transferred from classes 1, 2, 3 and 4 to class 5 during the year. Any other transfer should be made at the close of the fiscal year.

August 26, 1940

8-27

FILED
76

Honorable George L. Robertson
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Robertson:

This department is in receipt of your letter of August 22nd. Your letter contains two questions, and for convenience we shall segregate and give you our conclusions on each separately. The first question is as follows:

> "The budget that was made by the County Court of Chariton County, for the year 1940, provided and authorized the expenditure of $1,450.00 for furniture and adding machines for the office of the County Clerk. Does the County Clerk have the right to purchase such furniture and machines as he deems suitable and best for his office, or does that power vest solely in the County Court?"

In an opinion rendered by this department on May 9, 1935, to Joseph B. Wilhite, Prosecuting Attorney, Grant City, Missouri, we discussed and cited decisions which reviewed the history of the financial structure of counties prior to the passage of the County Budget Act. This decision has no bearing on the first question which you present but can be considered in connection with your second question. It is enclosed for the purpose of giving you our views and interpretations on various sections which were repealed by the County Budget Act and the limitations which the Budget Act now places on

counties and especially the officers which administer it. It is enclosed for the purpose of avoiding needless repetition in this opinion.

The authority of a county officer to purchase supplies necessary for the conduct of his office without authority from the county court has been recognized prior to the passage of the Budget Act in a number of decisions. Without quoting from the decisions, we mention the following merely to show that the county officer is still entitled to purchase the necessary supplies unless the financial condition of the county prevents the same. Gammon v. Lafeyette County, 79 Mo. l.c. 220; Sayler v. Nodaway County, 159 Mo. l.c. 524, 525; Ewing v. Vernon County, 216 Mo. 681. The authority of the county clerk to purchase such supplies, having been established, we next determine whether he is prevented from purchasing the same by the terms of the County Budget Act.

The original Act was passed by the General Assembly in 1933, Laws of 1933, pages 340 to 351, inclusive. Section 1, page 340, Laws of 1933, was amended in 1939, page 657, the only change being to the effect that the clerk of the county court "of the several counties of this state shall be the budget officer of such county and as such shall prepare all data, etc."

The Laws of 1937, page 422, repealed and reenacted Sections 2 and 3 of the original Act. We find no material changes with respect to Classes 4 and 6 which are the only classes which are pertinent to your question. Class 4 is as follows:

> "Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an ex-

> pendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Under section 3, page 342, Laws of 1933, it is the duty of the various officers to furnish estimates of their needs. The first sentence of said section is as follows:

> "It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office. * * * * * * "

Referring again to Class 4, we assume that the county clerk, in making his estimate, included certain supplies for his office. " * * * Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six." Therefore, the furniture and adding machines which the county clerk budgeted and requested to the amount of One Thousand Four Hundred Fifty ($1450.00) Dollars can be considered only with the terms of Class 6 in mind. Class 6 being as follows:

> "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however,

> that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

Many of the counties seldom, if ever, have any revenue in Class 6. It may be possible that your county is more fortunate and that there is a cash reserve in Class 6.

Therefore, we are of the opinion that the county clerk in your county can purchase the supplies which he originally budgeted and the same were approved by the county court.

II.

Your second question is as follows:

> "Does the County Court have the power to transfer funds from one class to another class at any time it deems desirable? If not, when and under what conditions does the County Court have the power to make a transfer from one class to another class?"

The only provision in the Budget Act for transferring funds from one class to another is mentioned in Class 5, page 423, Laws of 1937 --

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, the county court

> may transfer any surplus funds from classes 1, 2, 3 and 4 to class 5 to be used as contingent and emergency expenses. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

It will be noted from the above that the county court may, at any time when a surplus is determined in classes 1, 2, 3 and 4, transfer any such surplus to class 5. This department has never advised the promiscuous transferring of funds from one class to another, the burden and responsibility for making such transfers being on the county court and "any other officer participating in the issuance of a warrant contrary to the Budget Act." However, we are enclosing an opinion written to Honorable L. A. Pickard, Presiding Judge of the County Court, Kennett, Missouri, which contains suggestions as to transferring funds among the classes. Also, an opinion to Miss Carrie Williams, Treasurer of Barry County, Cassville, Missouri, which makes further suggestions of transferring funds.

The financial condition of a county should be the prime element to bear in mind before any transfer is made. If the financial condition is such that priority of payments can be sacredly preserved and no officer will incur liability under Section 8, Laws of 1933, page 346, then it is possible that funds may be transferred in the manner as outlined in the enclosed opinions.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

COUNTY COURT: May not sponsor a project to build for an association an engine house to be located in an unincorporated area of St. Louis County, Missouri.

August 17, 1940

8/19

FILED
77

H.W.J. Rott
County Court of
St. Louis County
Clayton, Missouri

Gentlemen:

We are in receipt of your letter of August 14th, wherein you state as follows:

"The Community Fire Department of St. Louis County has made a request to the Court that it act as sponsors of a project to build for the Community Fire Department a new engine house to be located in an unincorporated area of St. Louis County, Missouri. The Community Fire Department was incorporated in the May Term of the St. Louis County Circuit Court, 1927, Division #1, #60456. It is now operating under a Pro Forma Decree by virtue of such Court action. It is a non-profitable organization whose members receive no compensation, dividends or salary, and it derives its support from assessments in the sum of Two Dollars for each member of the organization. At this time the Department is serving a district comprising 6000 homes. For this fee the Community Fire Department renders a very efficient fire fighting service and also the use of its inhalator.

"Since the date of its incorporation it has grown and progressed and today the Community Fire Department owns about $25,000.00 worth of personal and real property.

"Various officers of St. Louis County have called upon the Community Fire Department, to render services such as flushing stagnate sewers, pumping out polluted wells and cisterns and for the use of the inhalator, which has saved many

lives for the citizens of St. Louis County in recent years.

"We feel that this is a very worth while project and we would be willing to sponsor the building of a new engine house, and our County Counselor has so given the consent of this Court to the St. Louis W.P.A. Office. However, they have countered with the proposition that they do not believe the County Court has the necessary authority to act as a Sponsor.

"Therefore, we would be pleased to have the opinion of your office regarding our legal authority in this matter.

"The Community Fire Department is ready and willing to put its proportionate share of the costs in escrow with this Court or any bank we might choose. If we can be of any assistance to you we will be glad to do whatever is within our power."

It is well established that a county "possesses only such powers as are expressly or impliedly conferred upon it by constitutional provisions or legislative enactments," and that "powers not conferred are just as plainly prohibited as though expressly forbidden * * *" 20 C. J. S. Sec. 49, P. 802, 803.

We have made a careful search of our Constitution and statutes, and find that counties are authorized to provide court houses, hospitals and jails, but we are unable to find any authority granted them to provide fire protection within its territorial confines, or to supervise, or order same to be provided.

In 20 C. J. S. Sec. 50, p. 804, we find the following statement: "In the absence of authority conferred by law, counties have no power to construct, operate, or maintain public improvements."

It is true that "in some states the constitutions confer on counties 'the right to make and enforce police regulations not conflicting with general laws'" (20 C. J. S. Sec. 49, p. 803) that might be construed to authorize counties to provide fire protection, including the construction of buildings to house the equipment, but such authority has not been granted in this State.

We note that the "Community Fire Department is ready and willing to put its proportionate share of costs in escrow" so that the county court could not be charged with lending its credit to an association in contravention of Sec. 47 of Article 4 of the Missouri Constitution. However, in view of the absence of constitutional and statutory authority of the county to provide for fire equipment or its housing we are of the opinion that the county court does not have the necessary authority to act as sponsor of a W.P.A. project to build for the Community Fire Department a new engine house to be located in an unincorporated area of St. Louis County, Missouri.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

MW/mc

ADMINISTRATION: Mortgaged land is an estate on which letters of administration should be granted. The Probate Court has no right to require security for costs except in the circumstances stated in Sec. 1238 R. S. Mo., 1929, Mo. Stat. Ann. page 1466.

February 21, 1940

2-23

FILED
78

Hon. C. S. Saltsman
Judge of Probate Court
Crawford County
Steelville, Missouri

Dear Sir:

This will acknowledge receipt of your letter dated February 7th, 1940, requesting our opinion in the following terms:

> "There has been filed with the Probate Court a motion by certain creditors of a man recently deceased in Crawford County. At the time of this man's death he left a great number of debts and some real estate, which real estate is heavily encumbered for much more than its actual worth. This creditor filing the motion has asked for administration upon the estate stating that she is the holder of a note secured by second mortgage on the real estate, and that the note itself will be outlawed before the lapse of nine months, at which time she could foreclose and the object of the administration would be so that she might have someone against whom she could file suit on this note before it is outlawed by the Statute of Limitations.

"My contention is that there is no estate because the encumbrances against the real estate are greatly in excess of its value and consequently there is no equity which would constitute an estate or any other property on which to administer. My contention has also been that Letters of Administration be refused and the motion denied on account of no estate existing.

"Will you kindly give me your opinion at the earliest possible date whether or not I am right, under these conditions? Also in the event that administration was granted can the Probate Court require bond for costs? I have been unable to find any law on this point, but am satisfied in the event of administration upon this estate that there would not be sufficient property to pay the costs."

The question whether letters of administration should be granted is answered by the following words of the Supreme Court in St. Louis National Bank, et al v. Field, et al, 156 Mo. 306, l.c. 310,311, 56 SW 1095:

"Under our law, upon the death of an intestate his whole estate, real as well as personal, is liable to come into the hands of his administrator for the payment of his debts. The administrator is not authorized to take possession of the real estate until ordered to do so by the probate court, but when so ordered, and when he takes possession under such order,

> the land is in custodia legis, and the administrator is liable on his bond for the lawful application of the rents arising out of it. It is his duty to collect the rents, and if so ordered by the probate court pay off the mortgage, if any, on the land, or if the court so order, sell it subject to the mortgage. (Eoff v. Thompkins, 66 Mo. 225; State to use v. Purdy, 67 Mo. 89; Lewis v. Carson, 93 Mo. 587.) The fact that the estate is insolvent and unable to redeem the mortgage, or that the mortgaged property is insufficient for that purpose, is a subject to influence the probate court in determining what orders it will make in reference to the mortgaged property, but it does not affect the jurisdiction of that court over the subject. * * * * * * *
>
> "The statute forbids a sale of land under a mortgage or deed of trust within nine months after the death of the mortgagor. (Sec. 144, R. S. 1889.) That provision is in line with other requirements of our statutes regarding the administration of estates indicating the control and care that the administrator should take of the real estate even when it is mortgaged. * * * "

R. S. Mo., 1889, sec. 144, cited above is to the same effect as R. S. Mo., 1929, sec. 141, Mo. Stat. Ann. page 88.

Regarding the value of the estate, as stated by the Supreme Court in Turner v. Campbell:

> "There is no positive rule of law that

an estate must be of a given value, as a condition precedent to the granting of letters testamentary (11 Am. & Eng. Enc. of Law, 2 Ed. 744; 18 Cyc. 71; Phinney v. McGregory 102 Mass. 186)."

The Probate Court has no right to require security for costs, except in the circumstances stated in Sec. 1238 R. S. 1929, Mo. Stat. Ann. page 1466, quoted and discussed in the attached copy of an opinion of the Attorney General, dated December 17th, 1937.

CONCLUSION

Mortgaged land is an estate on which letters of administration should be granted. The Probate Court has no right to require security for costs, except in the circumstances stated in section 1238 R. S. Missouri, 1929, Mo. Stat. Ann., page 1466.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

EH:RW

SHERIFF: When entitled to additional fees and mileage for resubpoenaing witnesses after first trial resulted in a hung jury.

3/30

March 16, 1940.

FILED 80

Judge Louis H. Schult
38th Judicial Circuit
Caruthersville, Missouri

Dear Judge:

We are in receipt of your letter of March 9th, wherein you state as follows:

> "We have a murder case pending in our Circuit Court which was tried at the last term and resulted in a hung jury. The witnesses are scattered over various parts of the county. The question now comes up if the witnesses are re-subpoenaed by the sheriff will the sheriff be entitled to his regular fees for serving the subpoenas and for mileage.
>
> "I have been unable to find anything in the statutes concerning this. No doubt this question has been presented to your office before. Please advise whether in your opinion the sheriff would be entitled to his regular fees and mileage, for re-subpoenaing witnesses after the first trial had resulted in a hung jury."

The rule in Missouri as to the taxation of costs in criminal cases is laid down in the case of Ring vs. Vogel 46 Mo. App. 374 l. c. 377 as follows:

> "Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the of-

ficer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

Section 3839 R. S. Mo. 1929, provides as follows:

"Whenever a witness in a criminal case has been once subpoenaed or recognized to appear before any court or magistrate, he shall attend under the same as such witness, from time to time, and from term to term, until the case be disposed of, or he be finally discharged by the court or justice; and he shall be liable to attachment for any default or failure to appear as such witness, and adjudged to pay the costs and such fine as the court may properly impose; and no costs shall be allowed for any subsequent recognizance or subpoenas for any such witness."

The above section is clear and unambiguous and provides that whenever a witness is subpoenaed to appear before a court he is required to attend as "such witness" until the case is disposed of or he is finally discharged, and that no costs are to be allowed for any subsequent subpoena for "such witness."

The failure of the jury to agree upon a verdict does not dispose of a criminal case, and it is specifically provided in such instance that (Section 3700 R. S. Mo. 1929):

"***** the cause must be tried again at the same or next term, as in the case of a failure of the jury to agree upon a verdict."

It is a well defined rule of statutory construction that legislative intention must be ascertained from the wording of the statute and said rule is well expressed in the City of St. Louis v. Pope 126 S. W. (2d) 1201 l. c. 1210:

> "In the Senter Commission Company Case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W. (2d) 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent ***** this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.'"

It will be noted that the underlined portion of Section 3839, supra, provides that no costs are to be allowed for any subsequent subpoena for any "such witness." It is evident that when a witness is discharged by the court that there is no duty imposed upon him by law to attend as "such witness." In the case of a new trial he would have to be resubpoenaed.

We are, therefore, of the opinion that a sheriff is not entitled to additional fees and mileage for resubpoenaing witnesses after the first trial has resulted in a hung jury, unless it is shown that the witnesses sought to be resubpoenaed were finally discharged by the court after attendance at the first trial.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting) Attorney General

MW/mc

PENAL INSTITUTIONS: 3/4s rule: Under the present statute, a convict
WHEN IT APPLIES: confined in the penitentiary cannot be deprived of the benefit of the three-fourths rule established by Section 8442 R. S. 1929 on the ground that he previously, while confined in the Intermediate Reformatory at Algoa, was incorrigible or escaped. A person confined in the Intermediate Reformatory may be held there for the full period of his sentence.

August 31, 1940

FILED
80

Honorable T. M. Scott, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated August 10, 1940, which is in the following terms:

> "On May 25, 1938, the Penal Board issued an order directing that transfers from the Intermediate Reformatory to the Penitentiary should be held to serve the full term of their sentences if the cause of transfer included incorrigibility at or escape from the Reformatory.
>
> Sec. 8475(b) R. S. 1929 says in part, 'Each person so transferred to the penitentiary shall be held therein, and subject to all the rules and discipline thereof until he becomes eligible for release, . . '. This might be construed as giving all transfers the benefit of the three-fourths rule (Sec. 8442).
>
> Will you please tell us if in your opinion the Board's order mentioned above violates Sec. 8475(b)?"

Section 8475(b) R. S. 1929, Mo. St. Ann. Sections 6225, 6226, does not necessarily give the benefit of the three-fourths rule (created by Section 8442 R. S. 1929, Mo. St. Ann. page 6214, as amended Laws 1939, Section 1,

pages 585, 596,) to persons transferred from the Intermediate Reformatory for Young Men at Algoa to the Penitentiary. Section 8475(b), supra, provides they shall be subject to certain "rules and discipline". That refers to rules made and discipline enforced by the Department of Penal Institutions (created by Section 8316 R. S. 1929, Mo. St. Ann. page 6174, and referred to in your letter dated August 10, 1940, as the Penal Board) and does not refer to statutory provisions. Other statutory provisions themselves give the benefit of the "3/4 rule" to convicts confined in the penitentiary. Said Section 8442 provides:

> "Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship: Provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the commission, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof: Provided further, that nothing herein shall be construed as repealing Section 12971, R. S. 1929."

It follows that the above quoted order of the Department of Penal Institutions does not necessarily violate said Section 8475(b). It does violate the provisions of of said Section 8442 by depriving a person of the benefit of the three-fourths rule without authority of law. That section authorizes the department to deprive a person of the benefit of three-fourths rule for a failure to "serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of same recorded against such convict * * *." A person who has been incorrigible in or escaped from Algoa has failed to serve three-fourths of his sentence in an orderly and peaceable manner, but has not committed an infraction of any rule of the prison, and can have none recorded against him. The prison is the separate and distinct institution in Jefferson City created and governed by Article V, Chapter 44, R. S. 1929. The Intermediate Reformatory at Algoa is a different institution created by Section 8466, R. S. 1929, Mo. St. Ann. page 6223, and Section 8467, R. S. 1929, Mo. St. Ann. page 6223 provides that the Intermediate Reformatory "shall be established separate and apart from the Missouri Penitentiary . ." Escape from or incorrigible conduct in the Intermediate Reformatory by one there confined is not an infraction of any rule applicable to the prison, and under said Section 8442 does not authorize anyone to deprive a convict later confined in the penitentiary of the benefit of the three-fourths rule.

Said Section 8442 applies only to a convict confined in the penitentiary, and acts done by him. At the outset, it refers to, "any convict who is now or may hereafter be confined in the penitentiary * *" and refers to acts done by him.

As stated above, the two institutions are separate, and this provision cannot apply to a convict confined in the Intermediate Reformatory and acts done by him. The persons considered in this opinion did not become convicts confined in the penitentiary until after the escape or the incorrigible conduct occurred.

In State vs. Carney 122 S. W. (2nd) 888, l. c. 889, the Supreme Court of Missouri held that a person convicted of an infraction of law while at large on parole cannot be deprived of the benefit of the three-fourths rule, and it in part said:

> "Giving literal meaning to its unambiguous language, we think it consonant with the legislative intent to say that the statute is not susceptible to the construction that a parolee, because of his subsequent conviction while at large under parole, is to be denied the benefits of the three-fourths rule and required to serve the full term for which he was sentenced. The evident purpose of enacting the statute was to stimulate and encourage a willingness on the part of convicts to voluntarily comply with the rules of the institution while undergoing punishment. Their own conduct, as reflected by the official records of the prison, is the measure by which there is either bestowed or withheld a fixed and predetermined reward for co-operation in promoting the orderly administration of prison discipline."

Neither a person outside the penitentiary at large on parole, nor a person outside the prison while in the Intermediate Reformatory is "confined in the penitentiary" within the meaning of said Section 8442, and neither is within its terms.

In an opinion dated March 9, 1938, addressed to Honorable Carl F. Wymore, Prosecuting Attorney of Cole County (No. 99), of which a copy is hereto attached, the Attorney General has heretofore ruled that an inmate of the Intermediate Reformatory is not "confined in the penitentiary." For that reason it was there held that the statute making it a felony for certain persons "confined in the penitentiary" to escape (Section 3913 R. S. 1929, Mo. St. Ann. page 2751), does not apply to persons confined in the Intermediate Reformatory.

Section 648 R. S. 1929, Mo. St. Ann. page 4896, provides:

> "No person's body shall be imprisoned or restrained unless by authority of law."

Because of all the foregoing, the order mentioned in your letter dated August 10, 1940, is in conflict with Section 8442. It is true that the Department of Penal Institutions has power to "make and enforce such by-laws, rules or regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board" (Section 8338 R. S. 1929, Mo. St. Ann. page 6181, as amended Laws 1939, page 571, Section 1). But, of course, such rules, when in conflict with the statutes, cannot prevail and cannot legally be enforced.

It necessarily follows what has been said above that a person confined in the Intermediate Reformatory may be there held for the full period of his sentence because the present said Section 8442 does not apply to him.

This opinion does not involve the cases of convicts who have escaped from prison farms as contradistinguished from farms of the Intermediate Reformatory.

CONCLUSION

Under present statutes, a convict confined in the penitentiary cannot be deprived of the benefit of the three-fourths rule established by Section 8442 R. S. 1929 on the ground that he previously, while confined in the Intermediate Reformatory at Algoa, was incorrigible or escaped. A person confined in the Intermediate Reformatory may be held there for the full period of his sentence.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RT
Enc.

EXTRADITION FROM CANADA: Of person convicted of robbery whose sentence has not been executed, effected by: application by governor for requisition; requisition by United States Sec. of State; judicial proceeding in Canada; order of surrender.

September 5, 1940

9-13

FILED

Honorable Thomas M. Scott, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated December 15, 1939, which is in the following terms:

> "I kindly ask that you advise what legal procedure is to be followed in returning an escaped prisoner of this institution from Canada. The subject is a Canadian Citizen by birth and residence and at the present time is incarcerated in the Stony Mountain Penitentiary, Canada. A detainer, stating that the subject is wanted by this institution as an escape prisoner, has been filed with the Canadian authorities.
>
> Your opinion as to what steps we should take in effecting the return of this escaped inmate to our institution will be greatly appreciated."

Your letter dated January 3, 1940, further stated in part:

> "In further reference to our telephone conversation this morning, having to do with the above named subject.
>
> I am enclosing herewith copies of correspondence between my office and the Cana-

dian authorities having to do with the return of this man to finish the remainder of his sentence at this institution.

Our records indicate that John Gunn, our #35921, was received at this institution December 18, 1929, from Cooper County to serve a sentence of 12 years for the crime of Robbery in the 1st degree and that while on detail duty at Ewing Farm he escaped September 27, 1931. This man is now incarcerated in the Stony Mountain Penitentiary, Canada, under the name of John Lynch, their register #4635. You will observe that Mr. Watson, (letter designated #1) states this subject apparently born in Hamilton, Ontario, and it is therefore not possible to return him to the United States via deportation.

* * * * * * * * * * * * * * * * * * * *

Your opinion as to what procedure we should follow in this particular case will be greatly appreciated."

This opinion has heretofore been held in abeyance by agreement between your office and this office, in order that the Department of Penal Institutions may determine whether it wishes to proceed with the extradition of the fugitive now or later, and in order to try to ascertain whether the Canadian authorities will be willing to discharge the fugitive through some method other than extradition.

Extradition is international. It is defined in 1 Moore on Extradition & Interstate Rendition, Section 1, page 3, as:

> "Extradition has been defined as the act by which one nation delivers up an individual, accused or convicted of an offence outside of its own territory, to another nation which demands him and which is competent to try and punish him."

The return of a fugitive from one of the United States of America to another is correctly termed "interstate rendition." 2 Moore, supra, Section 516, page 819,

International law recognizes no right to extradition apart from treaty. In Factor v. Laubenheimer, 78 L. Ed. 315, l. c. 320 (2), 54 S. Ct. 191, 290 U. S. 276, the Supreme Court of the United States said:

> "But the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, (see 1 Moore, Extradition, Section 14; Clarke, Extradition, 4th ed. p. 14) the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. See United States v. Rauscher, 119 U. S. 407, 411, 412, 30 L. ed. 425-427, 7 S. Ct. 234; Holmes v. Jennison, 14 Pet. 540, 569, 582, 10 L. ed. 579, 593, 600; United States v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; Dos Santos's Case, 2 Brock. 493, Fed. Cas. No. 4,016; Com. ex rel. Short v. Deacon, 10 Serg. & R. 125; 1 Moore, Extradition, Sections 9-13; cf. Re Washburn, 4 Johns. Ch. 106, 107, 8 Am. Dec. 548; 1 Kent, Com. 37. To determine the nature and extent of the

> right we must look to the treaty which created it. The question presented here, therefore, is one of the construction of the provisions of the applicable treaties in accordance with the principles governing the interpretation of international agreements."

The extradition of this fugitive from Canada is governed by the following treaties made between the United States of America and Great Britain: Article X of the Webster-Ashburton Treaty of 1842, 8 Stat., page 576; 2 Moore on Extradition & Interstate Rendition, page 1095, et seq., in part provides:

> "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of . . . robbery, . . . committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: . . . The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

The Treaty of 1889, 26 Stat., page 1508; 2 Moore, supra, page 1096, et seq. provides that it shall be "supplementary to the Tenth Article of the Treaty, concluded between the same High Contracting Parties on the 9th day of August, 1842." Said treaty of 1889 further provides in part:

> "ARTICLE VI.
>
> The extradition of fugitives under the provisions of this Convention

and of the said Tenth Article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering States.

ARTICLE VII.

The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime of which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

The list of crimes for which extradition may be granted between the United States of America and Great Britain and Canada was enlarged by a supplementary treaty between Great Britain and the United States, namely that of 1900, 32 Stat. page 1864, and by another supplementary treaty of 1905, 34 Stat., page 2903. The latest extradition treaty between Great Britain and the United States of America was that of 1932, 47 Stat., page 2122. It does not apply to the Dominion of Canada. Article XIV of said treaty in part provides:

"His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named -- that is to

> say, the Dominion of Canada, . . . Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington . . . "

By a letter dated January 5, 1940, this office asked the Department of State of the United States whether said Treaty of 1932 had been made applicable to the Dominion of Canada by accession as provided by the above quoted Article XIV. By a letter dated January 11, 1940, Mr. Green H. Hackworth, Legal Adviser of that department, in part stated:

> "The Treaty of Extradition with Great Britain of 1932 has not, through Article 14 thereof, been made applicable to Canada. Therefore, in accordance with the concluding paragraph of Article 16 of this same treaty the practice of extradition between the United States and Canada would be governed by the treaties of 1842, 1889, 1900, and 1905, which are referred to in your letter."

(The earliest treaty, namely that of 1794, 2 Moore, supra, page 1095, did not authorize extradition on the charge of robbery.)

The foregoing treaty provisions show that extradition of this fugitive, John Gunn alias John Lynch, may be granted because he has been convicted of the crime of robbery.

The above quoted treaty of 1842 provided that fugitives should be delivered up upon the making of requisitions. Applications for requisitions based on a violation of or conviction of violation of the laws of one of the United States of America must be made by the Governor of the demanding state to the Secretary of State of the United States. The latest memorandum issued by the Department of State regarding extradition

is that of September, 1921, of which a copy is in our file. At page 1 it states in part:

> "Extradition will be asked only from a Government with which the United States has an extradition treaty, and only for an offense specified in the treaty.
>
> All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated. When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the governor of the State or Territory."

The memorandum of the Department of State relative to extradition of July 1885 (and of May, 1890; 1 Moore, supra, page 333-339, Section 226 et seq.) is to the same effect.

It would be appropriate for the Warden of the Missouri State Penitentiary to inform the Governor of the facts, and to request him to make such application.

The application for a requisition should be in triplicate (memoranda of Department of State, supra). It should include duly authenticated, verified, complete copies of the record of conviction and sentence of the fugitive (Treaty of 1889, Article VII, supra). Regarding evidence of conviction, the memorandum of the Department of State of September, 1921, page 1, in part states:

> "If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient."

Said application should include certified prison records and sworn statements showing that the sentence of the fugitive has not been executed, that is, that he escaped before serving the period of time for which he was sentenced.

Said records must be duly certified and authenticated by the officers of the court, the official character of the officers and their authority to act must be certified, and all of the documents must be "then authenticated under the great seal of the State making the application." The seal of said state will thereafter be authenticated by the Department of State of the United States (memorandum of Department of State of September, 1921, page 2). Also, see Department of State memorandum of May 1890, 1 Moore, supra, 335, l. c. 336.

Said memorandum of September, 1921, page 2, further states in part, regarding the contents of the application:

> "Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States. It should also contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive, and not for any private purpose, and that if the application is granted, the criminal proceedings will not be used for any private purpose."

It is recommended that the application include authenticated records of the Missouri State Penitentiary and the Federal Bureau of Investigation of the Department of Justice of the United States, including fingerprints and photographs, in order to identify the prisoner as the convicted person who has escaped from the Missouri State Penitentiary.

Said application should include authenticated copies of the Laws of Missouri showing what crime the fugitive committed. The crime of robbery in the first

degree, of which this fugitive was convicted, is defined by Section 4058, R. S. Mo. 1929, (Mo. St. Ann., page 2856), and it includes such elements of the crime of robbery at common law that it clearly comes within the list of crimes for which extradition may be granted under the treaty.

Neither the Department of State of the United States nor the Governor of Missouri has any printed forms of application for requisitions. Reference may be made to an application written in March, 1934, by the Office of the Attorney General of Missouri, and used by others in an effort to effect extradition from Canada, in the case of State of Missouri v. Betty Jackson. It is a part of the official records of the Secretary of State of Missouri; it was filed there on March 22, 1934, in Box 208. Other forms are in 1 Moore on Extradition & Interstate Rendition, page 344-356, Section 233 et seq. Of course, we will prepare the above mentioned papers if and when the warden wishes us to do so.

The expense of this kind of proceeding must be borne by the State of Missouri. Treaty of 1842, supra, above quoted, states that such expense must be borne by the demanding nation. The memorandum of September, 1921, page 3, supra, states, "Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws." Also, see 1 Moore, supra, Section 399, page 604-606.

The Department of Penal Institutions of Missouri has a right to pay such expenses. Section 8437, R. S. Mo. 1929, (Mo. St. Ann., page 6213), as amended, Laws of Missouri, 1939, page 581, Section 1, provides:

> "Whenever any convict shall escape from the penitentiary, it shall be the duty of the commission to take all proper measures for the apprehension of such convict; and for that purpose it shall offer to pay a reward, not exceeding one hundred

> dollars, if such convict be apprehended outside of Cole county, and twenty-five dollars if such convict be apprehended in Cole County, for the apprehension and delivery of such convict; such reward shall be chargeable to the state. As amended, Laws 1939, p. 585, Section 1."

The reference to "the commission" in said Section 8437 is to the commission of the Department of Penal Institutions. That commission is created by Section 8316, R. S. Mo. 1929, (Mo. St. Ann., page 6174), as amended, Laws of Missouri, 1939, page 564, Section 1, and it has control and direction of the penitentiary.

It must have been intended by the legislature that the funds appropriated by it would be used to perform the duty of apprehension of criminals. The legislature appropriated One Million Dollars for, among other things, "travel within and without the state," as a part of the appropriation specifically for the Missouri Penitentiary in Laws of Missouri, 1939, Section 1, page 81. It appears that the expenses of this extradition may be paid from that appropriation.

The legislature appropriated $25,000.00 "for the apprehension of criminals" as a part of the total appropriation for the expenses of penal institutions and criminal costs in Laws of Missouri, 1939, Section 2, page 91. That appropriation legally would appear to provide a fund for the payment of the expenses of this extradition case. However, the State Auditor has informed us that that appropriation has been exhausted by payment of expenses of interstate rendition.

The requisition of the United States is addressed by the Secretary of State of the United States to Canada through the British Minister at Washington, D. C. (1 Moore, etc., supra, page 328, Section 221; 25 C. J., Section 65, page 279, Note 53). Thereafter a judicial proceeding is necessary in Canada.

It is to be recalled that Article VI of the Treaty of 1889, heretofore quoted, provides "that extradition shall be carried out in conformity with the laws regulating

extradition for the time being in force in the surrendering states." The latest extradition law of Canada to which we now have access is the Extradition Act in Revised Statutes of Canada, 1906, Volume III, Chapter 155, page 2929-2940. Pertinent portions of that Act are quoted and cited below.

Section II provides that "extradition arrangement" means "a treaty, convention or arrangement made by His Majesty with a foreign state for the surrender of fugitive criminals and which extends to Canada * * * "

Section III provides in part: "In the case of any foreign state with which there is an extradition arrangement, this Part shall apply during the continuance of such arrangement;"

Section IX in part provides: "All judges of the superior courts and of the county courts of any province, and all commissioners who are, from time to time, appointed for the purpose, in any province by the Governor in Council, under the Great Seal of Canada, by virtue of this Part, are authorized to act judicially in extradition matters under this Part, within the province; and every such person shall, for the purposes of this Part, have all the powers and jurisdiction of any judge or magistrate of the province."

Section X provides that "a judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him * * *." The purpose of this warrant is merely to bring the fugitive before the judge for a hearing. The form of this warrant, which is a part of Second Schedule of the Act, recites that the fugitive is to be brought before the judge"to be further dealt with according to law."

Section XIII provides: "The fugitive shall be brought before a judge, who shall, subject to the provisions of this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada."

Sections XIV and XV provide that the judge is to hear evidence regarding the issues, in effect.

Section XVI provides that judicial documents, depositions or statements on oath may be received in evidence to prove a conviction, and Section XVII declares that such papers may be deemed duly authenticated if certified to be originals or true copies by a judge, magistrate or officer of the foreign state.

Section XVIII in part provides: "(a) In the case of a fugitive alleged to have been convicted of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, prove that he was so convicted; . . . . . The judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law. 2. If such evidence is not produced, the judge shall order him to be discharged. R. S., c. 142, s. 11."

Section XIX requires that where a fugitive is committed for surrender, he must be informed that he has a right to apply for a writ of habeas corpus, and requires that the judge transmit a full transcript of the proceeding to the Minister of Justice. The Minister of Justice then may order the surrender of the fugitive to the foreign state (Section 25, form of order Second Schedule), and on that authority the authorized agent may remove the fugitive (Section 26).

The fugitive in this case is now confined in the prison in Canada. By a letter dated March 1, 1940, the commissioner of the Royal Canadian Mounted Police informed this office that "this convict's term is due to expire on the 16th of March, 1945." He further said, "It is, of course, quite within the bounds of possibility that the Remission Branch of the Department of Justice here may consider the release of this convict before 1945 in order that he may be returned to your custody."

In this connection, Section XXIV of said Act in part provides that: "A fugitive . . . who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence or otherwise."

And, Section XXVIII provides: "If a fugitive is not surrendered and conveyed out of Canada within two months after his committal for surrender, or, if a writ of habeas corpus is issued, within two months after the decision of the court on such writ, over and above, in either case, the time required to convey him from the prison to which he has been committed, by the readiest way out of Canada, any one or more of the judges of the superior courts of the province in which such person is confined, having power to grant a writ of habeas corpus, may, upon application made to him or them by or on behalf of the fugitive, and on proof that reasonable notice of the intention to make such application has been given to the Minister of Justice, order the fugitive to be discharged out of custody, unless sufficient cause is shown against such discharge. R. S. c. 142, section 19."

The circumstances above stated and the two sections last quoted above make it advisable to ascertain whether the Department of Justice of Canada would wish to discharge the fugitive from their custody if the extradition proceeding above described can be successfully consummated. If the extradition proceedings were commenced without such an understanding, and before expiration of the present sentence in Canada, the fugitive's imprisonment in Canada would delay his removal within the required period of two months after his committal for surrender, and thereby might furnish a ground for his discharge from custody under a premature extradition proceeding. Without such an understanding the present Canadian imprisonment would probably prevent the issuance of the warrant of committal for surrender by the judge, and the order of surrender by the minister of justice. Those obstacles would be obviated by the discharge or parole of the fugitive from the Canadian imprisonment while the extradition proceeding was pending, and after issuance of the preliminary warrant for the hearing.

If an agreement for discharge of the fugitive from Canadian custody is not made, then we suggest that the institution of extradition proceedings be withheld until about two months before the expiration of the fugitive's Canadian sentence for the reasons stated above. If you

wish us to communicate with the Canadian authorities regarding such an arrangement, we shall be glad to do so.

The above quoted and cited Extradition Act of 1906 is the same in effect, if not exactly so, as the Canadian Extradition Act of 1886, Revised Statutes of Canada, 1886, Chapter 142, 1 Moore on Extradition, supra, Section 448, page 682-694; Section 421, page 630.

By our letter, dated January 5, 1940, to the Secretary of State of the United States, we inquired whether some representative of the government of the United States of America will represent the State of Missouri in the judicial proceeding in Canada above mentioned. The reply of Mr. Hackworth, dated January 11, 1940, in part stated:

> "The Government of the United States has no facilities in extradition cases for effecting the identity of fugitives from the justice of the several States. It is therefore suggested that if the circumstances so warrant you consider the desirability of having your State effect the identity of the accused."

Therefore, if the Department of Penal Institutions decides to effect the extradition of this fugitive, a representative of the State of Missouri should conduct the judicial proceeding in Canada.

CONCLUSION

Under existing treaties and laws of Canada, extradition from Canada to the United States of America of a person convicted here of robbery, and whose sentence has not been executed, may be effected by: Application, by Governor of Missouri to the Secretary of State of the United States for a requisition; requisition by the United States on the British Ambassador at Washington, D. C.; a judicial proceeding in Canada; and, order of surrender by the Minister of Justice of Canada. The State of Missouri must pay the expenses. The Department of Penal Institutions of Missouri may legally pay said expenses.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:VC

SALES TAX: Automobiles sold in Missouri by a local agent for a Nebraska principal, to be delivered in Nebraska, are not subject to sales tax in Missouri.

February 6, 1940.

2-8

FILED
81

Captain A. D. Sheppard
General Headquarters
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Captain Sheppard:

We desire to acknowledge your request for an opinion on January 31, 1940, which is as follows:

> "Will you kindly render this department an opinion based on the following facts:
>
> One Ed Burge, living near Craig, Missouri, is a salesman for a Mr. Novak, Plymouth dealer in Falls City, Nebraska. Burge has sold several cars, both new and used, in this territory, Holt County, Missouri. He is the agent of the company, but the cars are delivered in Falls City, Nebraska.
>
> "Does this constitute a violation of sales tax law? No sales tax is paid on these sales, and dealers in the territory are concerned about this unfair competition as the sales tax on a new car is a consideration."
>
> "This information is for the particular attention of our Troop A. Lee's Summit, Missouri.
>
> "Your cooperation will be appreciated."

Sub-section (a) of Section 2 of House Bill No. 91, Laws of Missouri 1939, relating to sales taxes at page 859-60, is as follows:

> "Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange." (Underscoring ours)

Sub-section (b) of Section 1, thereof, at page 858, is as follows:

> "The term "Sale" or "Sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration any of the substances, things and services hereinafter designated and defined as taxable under the terms of this Act." (Underscoring ours)

The court, in the case of Artophone Corporation vs. Coale, 133 S. W. (2nd) 343, 348, in defining a transaction, said:

> "The word 'transaction' may and often does have a broader meaning than 'contract.' In Scott v. Waggoner, 48 Mont. 536, 139 P. 454, 456, L. R. A. 1916C, 491, 494, it is said: 'The term "transaction" is not legal and technical, it is common and colloquial; it is therefore to be construed according to the context and to approved usage. * * * As so construed, it is broader than

> "contract."' In Ritchie v. Hayward, 71 Mo. 560, 562, we said that 'transaction' is a more comprehensive term than 'contract.' To like effect see Barnard v. Weaver, Mo. App., 224 S. W. 152, 153. And in Roberts v. Donovan, 70 Cal. 108, 113, 9 P. 180, 182, 11 P. 599, we read that the term 'transaction' is a broader one than 'contract' - 'A contract is a transaction, but a transaction is not necessarily a contract.' And in Moore v. New York Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 371, 70 L. Ed. 750, 45 A. L. R. 1370, 1378, we read: '"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

Sub-section (a), supra, provides for a sales tax "upon every retail sale in this state" and sub-section (b), supra, defines a sale as "every closed transaction constituting a sale".

Therefore, every closed transaction constituting a sale shall be upon sales in this state before the Auditor of the state may impose a sales tax.

The right of a state to tax and the limitation of such right is stated in the case of M'Culloch v. Maryland, 4 Law Ed. 579, 607, 4 Wheat, 316, wherein Mr. Chief Justice Marshall said:

> "*It may be exercised upon every object brought within its jurisdiction. * * * All subjects over which the sovereign power of a state extends, are objects of taxation; *but those over which it does not extend, are, upon the soundest principles, exempt from taxation. * * * "

The same rule was stated in the case of Cleveland, Painesville & Ashtabula R. R. Co. v. Pa. 82 U. S. 300, 21 Law Ed. 179, in the following language:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

In the case of Campania General De Tabacos De Filipinas v. Collector of Internal Revenue, 73 Law Ed. 704, 706, 279 U. S. 306, 49 Sup. Ct. 304, the Supreme Court of the United States, in an excise tax case, had for decision the question as to whether sales took place in the Philipines at the branch office of a Spanish firm or whether the final acts, making effective the sales, took place in the United States. The court held:

"While the stipulation states that the merchandise was 'sold' in the United States by petitioner's agency there, this statement cannot be taken without qualification; it must be read with the limitation immediately following that such sales were 'subject to confirmation and absolute control as to price and other terms and conditions' by petitioner's Philippine branch. It does not appear whether the confirmation was, in each case, given by the Philippine branch direct to the buyer or was otherwise the final act consummating the sales within the Philippine Islands, or whether, as the trial court and petitioner seem to have assumed, it was a mere approval or ratification of the negotiations had by petitioner's American Agent, and authority to him to confirm or otherwise complete the sales in the United States. Certainly, if the former, the final acts of petitioner making effective the sales, which were the source of the profit, took place in the Philippine Islands as an incident to and part of its business conducted there. See Holder v. Aultman, M. & Co. 169 U. S. 81, 89, 42 L. ed. 669, 671, 18 Sup. Ct. Rep. 269; Lloyd Thomas Co. v. Grosvenor, 144 Tenn. 349, 233 S. W. 669; Charles A. Stickney Co. v. Lynch, 163 Wis. 353, 158 N. W. 85; Shuenfeldt v. Junkermann (C.C.) 20 Fed. 357.

"If, in fact, the sales were thus made in the Philippine Islands, we think it unimportant whether the merchandise sold was exported before or after its sale; it could not be seriously contended, and indeed petitioner does not contend, that a profit derived from such transactions would not be subject to

> the tax. For, in such a case, the entire transaction resulting in a profit, with the exception of the negotiations in the United States preceding the sale, would have taken place in the Philippines. Instead, petitioner asks us to construe the stipulation so as to bring it within the ruling of the Attorney General applied to a state of facts where every act effecting the sale took place outside the taxing jurisdiction. * * * "

In the case of McGoldrick v. Berwind-White Coal Mining Co., decided by the United States Supreme Court on January 29, 1940, the court held that "transfer of possession to the purchaser within the state * * * is the taxable event, regardless of the time and place of passing title" and that:

> "The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

Transfer of possession to the purchaser within the state being the taxable event and a necessary prerequisite for a closed transaction would preclude an assessment in Missouri where delivery was to be made in Nebraska.

In the case of Gunther v. McGoldrick, 279 N. Y. Reports, 148, 150, the court said:

> "The determination of the Comptroller with respect to the disputed assessment was annulled by the Appellate Division and a refund directed of the of the amount deposited upon the ground that under the undisputed facts the transactions in question involving future deliveries outside the city of New York were not taxable as they were not consummated until the merchandise was delivered to the petitioner's customers outside the territorial limits of the city, including merchandise delivered in interstate commerce to points outside of the State of New York."

CONCLUSION

Therefore, it is the opinion of this department that the acts of a Missouri agent, of a Nebraska principal, in making local sales of automobiles to be delivered in Nebraska by such principal to the purchaser does not effectuate a closed transaction necessary to constitute a sale under the Sales Tax Act, Laws of Missouri 1939.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

INSPECTION OF FACTORIES, WAREHOUSES, ETC.: State Commissioner of Labor has no authority under Section 13218, R. S. Mo. 1929, to inspect a nursery.

February 6, 1940

2-7

FILED

81

Mr. Earl Shackelford
Commissioner of Labor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 25, 1940, which reads as follows:

> "A question has arisen concerning the authority of this department to make inspections of nurseries who sell potted plants, bulbs, shrubbery, etc., grown on their premises. The inspection of these establishments have been made under the provisions of Section 13218 of the Revised Statutes of Missouri, 1929, by classifying them as mercantile establishments because of the fact that they do a wholesale and retail business with the products grown by them.
>
> Will you please give us an opinion in this matter, advising whether or not we have such authority to make such inspections under the provisions of the section above mentioned."

We assume from your statement that you have in mind nurseries in the true sense of the word, and whatever selling is done by them is from nurseries proper, and do not have in mind persons who sell nursery products but do not produce any of the productions which they sell. Therefore, this opinion is restricted to nurseries in the true sense of the word. That is, the growing and producing of bulbs, shrubs, potted plants and all manner of greenhouse products.

Section 13218, R. S. Mo. 1929, Chapter 95, Article 59, which Article 59 has to do with the inspection of factories, warehouses, etc., reads as follows:

> "The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various establishments: Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

In the case of City of Ozark v. Hammond, 49 S. W. (2d) 131, the court defined the word "merchant" as follows:

> "A merchant is one who is engaged in the purchase and sale of goods; a trafficker, a trader."

In Words and Phrases, 5th Edition, Volume 3, the term "mercantile establishment" has been defined as follows:

> "A mercantile establishment is a place where the buying and selling of articles of merchandise is conducted. Veazey Truck Company v. Braza, 37 Pac. (2d) 294, 169 Okla. 418."

Section 13218, supra, has to do with the powers and duties of commissioners and deputies. If nurseries are to be inspected, the right must come under the provisions in the aforesaid section.

Section 10075, R. S. Mo. 1929, defines who is declared to be a merchant, and this section reads as follows:

> "Every person, corporation or co-partnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose is declared to be a merchant."

In the case of Kansas City v. Lorber, 64 Mo. App. 608, the court, in discussing the word "merchant", defined it as follows:

> "The term 'merchant' has been defined to be strictly a buyer, but by extension, one who buys to sell, or buys and sells; one who deals in the purchase of goods; a dealer in merchandise; a trader. Kinney's Law Dict. & Glos. 459. One who buys to sell again and who does both, not occasionally, but habitually, as a business; one who buys and sells an article. Anderson's Law Dict. 671. One who is engaged in the business of buying commercial commodities and selling them again for the sake of profit. Century Dict. 3713."

In the case of Ward Baking Company v. City of Ste. Genevieve, 119 S. W. (2d) 292, the Supreme Court had this to say:

> "A merchant is one who is engaged in the purchase and sale of goods; a traificker; a trader. * * * * * A manufacturer is one engaged in making materials, raw or partly finished, into wares suitable for use. * * * * * 'The marked distinction between a manufacturer and a merchant is that the merchant, or dealer, sells to earn a profit, and the manufacturer sells to take profit already earned. He must buy the materials out of which to make his finished product, and he must sell the product of his factory after it is finished. But such dealings are not his occupation. The one supplies him with the materials with which to pursue it, while the other merely enables him to take the profit earned."

Upon the analogy of these cases and the reasoning of the courts, which we think is sound and applies to the instant question asked by your department, we must

conclude that in the operation of a nursery business, it is elementary that the seeds or plants are placed in the ground, and, after due time, they grow and multiply into salable products; and one who is engaged in such business must be thought of as one who produces bulbs, plants, trees and other productions which are grown by agricultural means. After these productions are raised, they have enhanced themselves in value, and the situation confronting the owner of the nursery is to realize a profit from his products. He is in the same position as a manufacturer who converts raw materials into a finished product and, having succeeded in doing this, sells his products.

We conclude, therefore, that the situations are very closely related although they are very foreign to each other. In the light of the reasoning of the Ward Baking Company case, supra, one is driven to the conclusion that in the operation of the nursery, which for the purpose of this opinion is taken to be the primary business, when the productions are produced from the land, and once in a salable state, the owner merely takes profit which he has earned because of his efforts in the operation of the nursery, whereas, a merchant is one who operates his business with a view of realizing profits which come from skillful purchase, barter, speculation and sale.

The term "mercantile establishment" is further defined to be a place where the buying and selling of an article of merchandise as an employment is conducted. See 21 C. J. 904.

Therefore, in conclusion, it is the opinion of this department that nurseries, as defined in your question, do not come within the meaning of Section 13218, R. S. Mo. 1929.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:VC

LABOR; WOMEN: Sec. 13210 R. S. Missouri, 1929, Mo. Stat. Ann. page 4776, does not apply
WORKSHOP; to female employees doing stenographic and clerical work in a general office
OUTSIDE WORK: where no sales are made but where reports from local retail stores are assembled and consolidated; said sec. 13210 does not apply to female employees doing outside sales work.

March 5, 1940

37

FILED
81

Mr. Earl H. Shackelford,
Commissioner
Labor and Industrial Inspection
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated February 26, 1940, in which, in the following terms, in part, you request our opinion:

> "1. Does Section 13210 apply to female employees doing stenographic and clerical work in a general office where no sales are made but where reports from local retail stores are assembled and consolidated?
>
> 2. Do the provisions of Section 13210 apply to female employees doing outside sales work?"

The letter of the Singer Sewing Machine Company dated February 23, 1940, addressed to the Commissioner of Labor is herewith returned.

Section 13210 R. S. Missouri, 1929, Mo. Stat. Ann. page 4776, provides:

> "No female shall be employed, permitted, or suffered to work, manual

> or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided further, that nothing in this section shall be construed and understood to apply to telephone companies; and be it further provided, that the provisions of this section shall not apply to towns or cities having a population of 3,000 inhabitants or less."

A well settled rule of statutory construction is that, as stated in State ex Inf. Conkling ex rel v. Sweeny, 270 Mo. 685 l.c. 692, 195 SW 714, "the expression of one thing is the exclusion of another." Before the office and employees described in your first question can be within the application of said section 13210 they must be found within its terms. The office

is not a "manufacturing establishment" because nothing is manufactured there. It is not a "mechanical establishment" because the mechanical element does not predominate. The criterion of a mechanical establishment was well stated in the following terms in State v. Crounse, 105 Neb. 672, 181 NW 562:

> "* * * The mere fact that machinery or mechanical appliances, or mechanical or manual labor, is used, or found to be employed, does not necessarily characterize the establishment as a mechanical establishment. It seems to us that, before the establishment can be said to be a mechanical establishment, the mechanical element must predominate. * * * * *"

The office is not a "mercantile establishment" because nothing is sold there. It is clearly not a "factory, laundry, bakery, restaurant or place of amusement." In Sec. 13287 R. S. 1929, Mo. Stat. Ann. page 4817, in the same chapter (chapter 95) in which said section 13210 is found, on the same subject (employment of women) the Missouri Legislature defined a "workshop" in the following terms:

> "* * * The expression 'factory' means any premises where steam, water or other mechanical power is used in aid of any manufacturing process there carried on. The expression 'workshop' means any premises, room or place, not being a factory as above defined, wherein any manual labor is exercised by way of trade, or for purposes of gain, in or incidental to any process of making, altering, repairing, ornamenting, finishing or adapting for sale any article or part of an article, and to which

> or over which premises, room or place the employer of the persons working therein has the right of access or control: Provided, however, that the exercise of manual labor in a private house or room by a family dwelling therein shall not in itself constitute such house or room a workshop within this definition."

Said definition is fundamentally consistent with other definitions by the courts and by the legislatures of other states, some of which may be found in 71 C. J. page 1616; Sorseleil v. Red Lake Falls Milling Company, 126 NW 903, 905, 111 Minn. 275. It is basically consistent with the definition under English Laws and Statutes. Fuller v. Squire (1901) 2 K. B. (Eng.) 209, 70 L.J.K.B.N.S. 689, 85 L.T.N.S. 249, 65 J. P. 660, 49 Week. Rep. 683, (16 A. L. R. 541). A similar definition is found in Webster's International dictionary (1927) page 2350. The office here considered lacks the element of being one wherein work was done "in or instrumental to any process of making, altering, repairing, ornamenting, finishing or adapting for sale any article or part of an article." Said office is not within any of the above quoted and cited definitions and said section 13210 does not apply to such office.

It was held in one Washington case that the office of a gas company was included within the term "workshop." However, that case is different from this one and does not apply, because the basis of that decision was a statutory definition which was clearly broader than the definition of a workshop, above quoted, by the Missouri Legislature. Gowey v. Seattle Lighting Company, 184 Pac. 339, 108 Washington 479.

Regarding your second question, said Section 13210 by its terms applies only to work done "in" certain kinds of establishments. Said Section 13210 does not apply to employees working outside such establishments.

CONCLUSION

Section 13210 R. S. Missouri, 1929, Mo. Stat. Ann., page 4776, does not apply to female employees doing stenographic and clerical work in a general office where no sales are made but where reports from local retail stores are assembled and consolidated; said section 13210 does not apply to female employees doing outside sales work.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

EH:RW

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

MOTOR VEHICLES: Employees of WPA operating motor vehicles in the transportation of persons or property are not required to provide themselves with a chauffeur's or registered operator's license.

March 19, 1940.

3-25

FILED
81

Captain A. D. Sheppard
Commanding Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of March 9th, wherein you state as follows:

"This department would like to have opinions rendered covering the following conditions:

"1. A laborer is hired by the day to drive a truck owned by a contractor doing WPA work. The driver receives his wages from the contractor. Is he required to provide himself with a chauffeur's or registered operator's license?

"2. A laborer is hired by the day to drive a truck which is leased from a private individual and used in WPA work. The laborer receives his wages from the WPA. Is he required to provide himself with a chauffeur's or registered operator's license?

"3. A laborer owns and drives his own truck doing WPA work and is paid for his services by a contractor who has contracted for a portion of this work. Is he required to provide himself with a chauffeur's or registered operator's license?

"4. A laborer owns and drives his own truck doing WPA work and is paid for his services by the WPA out of Federal funds. Is he required to provide himself with a chauffeur's or registered operator's license?"

Section 7759 R. S. Mo. 1929, defines the terms "chauffer" and "registered operator" as follows:

"'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire. *****

"'Registered operator.' An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle. *****"

Section 7765 R. S. Mo. 1929, provides for the registration of chauffeurs in part as follows:

"(a) Every person desiring to operate a motor vehicle as a chauffeur shall file in the office of the commissioner a statement containing *****"

"(b) Upon the filing of such statement and photographs, if the commissioner is satisfied as to the competency *****, he shall assign to him a number and upon the payment of a fee of $3.00 he shall issue and deliver to such applicant a certificate of registration which shall contain *****"

Section 7766 R. S. Mo. 1929, provides for the registration of registered operators in part as follows:

"(a) Every person desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement containing *****"

"(b) Upon the filing of such statement and the payment of a fee of $3.00, the commissioner shall issue and deliver to the applicant a certificate of registration, which shall contain *****"

Section 7783 R. S. Mo. 1929, provides in part as follows:

"(a) *****Chauffeurs and registered operators shall at all times carry, subject to inspection, the registration certificate furnished by the commissioner."

In the case of Goldstein vs. Sommerville, 10 New York Sup. (2d) 747 l. c. 748, the court in holding that the Works Progress Administration was a Federal Agency and its employees had the same immunity enjoyed by all other agencies and instrumentalities of the U. S. A. said;

"The Works Progress Administration is a Federal agency. United States v. Owlett, D. C., 15 F. Supp. 736. As such instrumentality it is immune from suit in a state court. Manufacturers Trust Co. v. Ross, 252 App. Div. 292, 299 N.Y.S. 398; United States v. Owlett, supra. In the last cited case it was said, 15 F. Supp. page 741: 'Since the Works Progress Administration is admittedly a federal agency, that agency, its employees and records must have the same immunity which is enjoyed by all other

agencies and instrumentalities of the United States of America, such as the post office, the Army or the Navy.'"

In the case of Johnson vs. Maryland 41 Supreme 16, 254 U. S. 51, 65 Law Edition 126, State of Maryland arrested one Johnson, an employee of the Post Office Department of the U. S., while driving a governmental truck in the transportation of mail. He was convicted and fined for driving without having obtained a driver's license. The court upon reversing the judgment and holding that the applicant did not have to obtain a state driver's license said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed."

From the above cases we conclude that persons employed by the WPA to operate motor vehicles in the transportation of persons or property are not required to obtain a chauffeur's or registered operator's license.

In order to answer your questions it is essential that we determine in each case whether the laborer is an employee of the WPA or the contractor.

In the case of Simmons vs. Kansas City Jockey Club 334 Mo. 99, 66 S. W. (2d) 119 l. c. 124, the court defines the word "employee" thus:

> "Further contention is made that plaintiff's instruction No. 2 is erroneous. The instruction is short. It reads as follows: 'The jury are instructed that by the word "employee" as used herein means a person employed to labor for the pleasure or interest of another or one employed to render service or assistance in some trade or vocation and one over which the employer retains the right to direct the manner in which the work shall be done, and not only what shall be done, but how it shall be done and who the employer has a right to hire and discharge.' This instruction correctly defines the word 'employee.' 39 C. J. 33, 35."

In the case of Taylor vs. City of Los Angeles 84 Pac. (2d) 242 l. c. 243, a crew was engaged in the removal of an old abandoned concrete stone drain from a ditch on a street in Los Angeles. A spark from a jack hammer operation caused an explosion of accumulated gas, resulting in plaintiff suffering serious burns. The work was being done as a WPA project, and it was sought to hold the city liable for the injuries.

The court in holding that the work was done under the rules and regulations of the Emergency Relief Administration over which the city had no control and therefore not liable said:

> "'Courts have judicially noticed the fact that the primary objective of the Federal Emergency Relief Appropriation Act of 1935 (15 U.S. C.A 728 note) was not to benefit particular municipalities or localities, but to provide relief for unemployment. By contributing a small part of the necessary expense and by contributing the services of a superintendent and a small number of employees the City of Los Angeles was able to obtain

the benefit of this project. It was not, however, city work of which the city had control, but was under the rules and regulations of the Emergency Relief Administration. Hoover v. Independent School Dist., supra; Shelton v. City of Greeneville, 169 Tenn. 366, 87 S. W. (2d) 1016; Todaro v. City of Shreveport, supra.'

"The allegations of plaintiffs' complaint clearly recited a state of facts from which the trial court properly concluded, not only that no cause of action was stated against defendant City of Los Angeles, but also that no purpose could be served by permitting an amendment.

"The judgment is therefore affirmed."

CONCLUSION

(1) From the facts stated in case 1, we assume that the WPA does not have the right to hire, discharge, or control the party, and therefore we are of the opinion that a laborer who receives his wages from the contractor and is hired by the day to drive a truck owned by the contractor doing WPA work is required to provide himself with a chauffeur's or registered operator's license.

(2) From the facts stated in case 2, we assume that the WPA has the right to hire, discharge, and control the party, and we are therefore of the opinion that a laborer who receives his wages from the WPA and is hired by the day to drive a truck which is leased from a private individual and used in WPA work is not required to provide himself with a chauffeur's or registered operator's license.

(3) From the facts stated in case 3, we assume that the WPA does not have the right to hire, discharge or control the party, and we are therefore of the opinion that a laborer who owns or drives his own truck doing WPA work, and is paid for his services by a contractor who has contracted for a portion of the work is required to provide himself with a chauffeur's or registered operator's license.

(4) From the facts stated in case 4, we assume that the WPA has the right to hire, discharge and control the party and are therefore of the opinion that a laborer who owns and drives his own truck doing WPA work and is paid for his services by the WPA is not required to provide himself with a chauffeur's or registered operator's license.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting) Attorney General.

MW/mc

LABOR DEPARTMENT:)
EMPLOYMENT OF CHILDREN:)
MUNICIPAL OPERA, ST. LOUIS,)
MISSOURI:)

Children participating in play, "The American Way," under the supervision of their mothers, does not violate Section 14087, R. S. Mo. 1929.

May 31, 1940

6-1

FILED
81

Honorable Earl H. Shackelford
Commissioner of Labor
Jefferson City, Missouri

Dear Mr. Shackelford:

This Department acknowledges receipt of your letter of May 31st, wherein you make the following inquiry:

> "We attach hereto carbon copies of correspondence between our Deputy Commissioner in St. Louis and Mr. Jacob M. Lashly, representing the Municipal Opera Company in St. Louis, with reference to the use of minors between the ages of nine and thirteen years on the stage of the above named Opera Company in the City of St. Louis.
>
> "We would appreciate an opinion from you giving us your construction and interpretation of the provisions of Section 14087 of the Revised Statutes of Missouri, 1929, which reads in part as follows:----'nor in any concert hall, theatre or cabaret; nor in any restaurant; except students in high schools, colleges or universities who may be so employed with the approval of the school authorities.'
>
> "The correspondence enclosed herewith is self-explanatory and an

immediate opinion would be greatly appreciated, inasmuch as this performance will begin June 3rd."

Section 14087, R. S. Mo. 1929, is as follows:

"No child under the age of sixteen years shall be employed, permitted or suffered to work at any of the following occupations or in any of the following positions: Upon any scaffolding, nor erecting or repairing of electric wires or lines, nor in operating any railway or railroad engine or car, or street or interurban car; nor in connection with any construction or repair work on or for any railway or railroad, street or interurban line or tracks; nor upon or in the operation of any passenger or freight elevator; nor in the operation of any automobile, truck or motor vehicle; nor in any concert hall, theater or cabaret; nor in any restaurant; except students in high schools, colleges or universities who may be so employed with the approval of the school authorities, nor in any other occupation dangerous to the life, health or limb, or injurious to the health or morals of children under the age of sixteen."

We have read the attached copy of a letter to Mrs. Lottie C. Walsh, Deputy Commissioner of Labor, from Honorable Jacob M. Lashly, who represents the Municipal Opera Company in St. Louis.

The writer has witnessed a number of programs each season given by the Municipal Opera in the open air stadium and can visualize the nature of the performance of the children under the age of sixteen who are involved in your question. The program, "The American Way," we are informed is to begin June 3d and continue for two weeks. Mr. Lashly states that the children "are in no

sense employed." The statute uses the expression, "* * * shall be employed, permitted or suffered to work at any of the following occupations * * *." The clause "nor in any concert hall, theater or cabaret," we think refers to children being employed in a menial capacity, that is, some form of labor which necessitates the child doing manual labor, rather than acting on the stage. In addition, the terms "concert hall" and "theater" in all probability refer to regular establishments.

We also agree with Mr. Lashly's statements relative to the fact that it is highly questionable as to whether or not the children, by participating in the play, are engaging in an occupation. The fact that the mothers or natural guardians of the children will in all probability accompany them and supervise their welfare during the performance, might be considered under the provisions of Section 14086, R. S. Mo. 1929.

Referring to the last provision of Section 14087, supra, there appears to be no action on the part of the children, as outlined by Mr. Lashly, which would be injurious to life, health, limb or morals of the children.

We are of the opinion that the participation in the play "The American Way" at the Municipal Opera, wherein children are used in the play, would not constitute a violation of Article 3, Chapter 125, R. S. Mo. 1929, relating to the employment of children under the laws of our State.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

MOTOR VEHICLES: Trailers belonging to political subdivisions are [redacted] exempt from registration.

710

June 25, 1940

FILED
81

Captain A. D. Sheppard, Commanding
Captain R. E. Moore
General Headquarters
Mo. State Highway Patrol
Jefferson City, Missouri

Gentlemen:

We are in receipt of your request for an opinion based on the following statement of facts:

"The Little River Drainage District is a political subdivision of the State and exempt from payment of motor vehicle license fees on motor vehicles used by it in the conduct of the district. There is no question about the correctness of this as a legal proposition.

"A few weeks ago The Little River District purchased a small dragline excavating machine for doing maintenance work on the ditches of the district. In order to transport this machine from one place in the district to another, it also purchased a low-wheel trailer so that the dragline might be driven on the trailer and then transported over the highways from one job to another.

"Application has now been made by a Superintendent of one of the CCC Camps to borrow or rent this trailer in order to move some of the CCC owned equipment from one ditch to another where they are doing work for other drainage districts. You understand that the CCC organization works in cooperation with various drainage districts in a cooperative cost arrangement whereby the drainage districts pay for certain items of expense and the labor is furnished by the CCC enrollees.

"The cost of transporting the CCC machine from one district to another or from one location in the same district to another location in the same district is required to be paid by the drainage district for whom CCC does the work. Hence arises the request for the use of this trailer in some of this cooperative work between CCC and other drainage districts.

"The drainage districts, like this district, are political subdivisions of the State and are not required to pay motor vehicle license fees, being expressly exempt under the statute.

"The frequency of the use of the new trailer for such purpose would be only at remote periods and under CCC regulations cannot be for any extended distance beyond the location of the CCC Camp.

"The Little River Drainage District, through its Board of Supervisors, has evidenced a willingness to let other drainage districts and CCC Camps use the trailer, upon condition that they would pay a reasonable charge for such use, but subject to result of conference with you.

"The question now arises as to whether or not, under the above state of facts, The Little River District (owner of the trailer) would be required to pay a motor vehicle license fee on the trailer because of the rental it would receive from the other district. If such a requirement be made, then this district will, of necessity, be required to refuse the use of the trailer to the CCC and other drainage districts because the capacity of the trailer is quite large and would carry a high license fee and the compensation which it would get from an occasional use in 'loaning' the trailer to another district would not be equal to the amount of the license fee, should The Little River District be required to pay such a fee."

Section 7767 (b) R. S. Mo. 1929, provides the following exemption for political subdivisions:

> "Motor vehicles used as ambulances, patrol wagons and fire apparatus, owned by any municipality of this state, shall be exempt from all of the provisions of this article while being operated within the limits of such municipality, but the municipality may regulate the speed and use of such motor vehicles owned by them; and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates: Provided, however, that there shall be displayed on each side of such motor vehicle, in letters not less than 3 inches in height with a stroke of not less than 3/8 of an inch wide, the name of such municipality, county or political subdivision, the department thereof, and a distinguishing number. No officer, or employe of the municipality, county or subdivision, or any other person shall operate such a motor vehicle unless the same is marked as herein provided, and no officer, employe or other person shall use such a motor vehicle for other than official purposes."

It is to be noted that the exemption relates only to"motor vehicles," and the uestion arises whether a trailer is a motor ve icle within the meaning of the above section?

Section 7759 R. S. Mo. 1929, provides in part that:

> "Whenever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows:
> * * *
>
> 'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors.

'Trailer.' Any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by a self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle."

In the case of State v. Schwartzmann Service 40 S. W. (2d) (Mo. App.) 479, a trailer, attached to a semi-trailer and tractor was held to be a "motor vehicle" within the statute prohibiting the operation on highways of motor vehicles having excessive gross weights. The court in its opinion said l. c. 481:

"In the strict literal sense, maybe, a motor vehicle is one which is propelled by motor power directly transmitted from the motor of the vehicle to the wheels of the vehicle through its own mechanism; but there can be no question that a trailer attached to and propelled by such a motor vehicle, is itself, in a broad sense, motor-propelled, and, in that broad sense is a motor vehicle."

A statute, our courts have said, should not be given an unreasonable construction, where it can be given a reasonable construction, State ex rel. St. Louis Public Service Company v. Public Service Commission 326 Mo. 1169, and further that a statute will not be construed to lead to absurd results if it is susceptible to reasonable interpretation, State v. Irvine 335 Mo. 261, 72 S. W. (2d) 96. It seems absurd and unreasonable to conclude that the Legislature would grant an exemption to a self-propelled vehicle and require the registration of a trailer propelled over the highways by such self-propelled vehicle.

The Legislature obviously never intended such restricted a definition of the term "motor vehicle" as used in Section 7759, supra, be given to the term as used in Section 7767 (b), supra, and we are therefore of the

opinion that trailers belonging to political subdivisions are exempt from registration.

The next question is whether by reason of the rental of the trailer to the CCC the political subdivision would be required to register the trailer?

Section 7761 R. S. Mo. 1929, provides for the registration of motor vehicles and trailers by owners in part as follows:

> "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise expressly provided, cause to be filed, * * * an application for registration * * *. Upon the filing of such application, * * * the commissioner shall assign a number to such motor vehicle, and * * * issue and deliver to the owner a certificate of registration."

In the rental of the trailer the title or ownership would still remain in the political subdivision, and the latter being exempt, the fact that rental would be received would in our opinion not destroy the exemption so as to require registration of the trailer.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

MW/mc

COUNTY AUDITOR: (1) May presently resign effective on day named; (2) Governor can not make prospective appointment effective on day named in resignation; (3) Form of resignation.

SHERIFF: (4) Has authority to select bailiffs to attend upon court; (5) Forbidden to enter into special contract as to compensation.

November 19, 1940 11/27

FILED
81

Mr. S. J. Shepherd
Auditor, Buchanan County
Courthouse
St. Joseph, Missouri

Dear Mr. Shepherd:

You have orally requested that we furnish you an opinion on the following facts:

(1) Can the present Auditor of Buchanan County, who has been elected to the office of Sheriff, resign presently but not to take effect until a day named?

(2) If the answer to question one is in the affirmative, can the Governor make a prospective appointment effective on the day named?

(3) Can the circuit judges select the bailiffs for their respective courts, or does the sheriff determine who is to be selected?

(4) May a sheriff enter into an agreement to be paid a stipulated sum monthly for mileage in serving summons?

You have further requested that we submit to you a form of resignation.

I

Section 12200, R. S. Mo. 1929, relates to the office of county auditor and provides that the Governor

may fill vacancies occurring by resignation:

> "At the general election in the year 1902, and every four years thereafter, a county auditor shall be elected by the qualified voters of such counties, who shall be commissioned by the governor and shall enter upon the discharge of his duties on the first Monday in January next ensuing his election, and shall hold his office for the term of four years, and until his successors shall be duly elected and qualified, unless sooner removed from office; and when any vacancy shall occur in the office by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time an auditor shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

There can be no doubt of the right of a county auditor to resign his office. The Supreme Court in the case of State ex rel. v. Bus, 135 Mo. 325, l. c. 331, said:

> "Whatever doubt may exist in some jurisdictions as to the right of a public officer to resign his office without the concurrence of the officer or body which has the power to act upon it, all doubt is removed in this state by a constitutional recognition of the right. The constitution (sec. 5, art. 14) declares:

> "'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected and qualified.'"

46 C. J., Section 130, page 979, in discussing prospective resignations, states as follows:

> "A prospective resignation, even though accepted, doesnot take effect until the day named; * * *"

In the case of State ex rel. Berry v. McGrath, 64 Mo. 139, a judge of the circuit court transmitted his resignation to the Governor in July, 1876, which resignation was expressed to take effect on the 31st day of December, 1876. The court, in holding that its acceptance prior to December, 1876, would not vacate the office, said (l. c. 141):

> "Now, notwithstanding the fact that Judge Henry's resignation was transmitted to the governor in July, 1876, he continued to be judge of the 27th Judicial Circuit until the 31st day of December, 1876. On that day, and not before, did his resignation take effect, no matter when it was accepted by the governor. From that day, and not before, did his office become vacant. As the relator claims to have been elected prior to that time, he was elected before any vacancy existed and without authority of law."

In answer to your first question, it is our opinion that you may presently resign from office and that same will not take effect until the day named.

II

46 C. J., Section 64, page 952, in discussing prospective appointments to fill vacancies in public office, states that:

> "The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee."

The above rule would permit a prospective appointment to fill a vacancy, absent a law forbidding it.

Section 11, Article V, of the Missouri Constitution, provides when the Governor may fill vacancies in office:

> "When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

Under the above section the office must be vacant in order to authorize an appointment by the Governor. The question then is - When does the office become vacant so as to authorize it to be filled by the Governor?

The court in the case of State ex rel. Boecker, 56 Mo. 17, l. c. 21, said:

> "In this latter case the judge who wrote the opinion of the court, in defining what a vacancy is, and when it happens, says: 'There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. * * * An existing

> office without an incumbent is vacant, whether it be a new or an old one.'
>
> "In Biddle vs. Willard (10 Ind., 62), it was held that to constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of an office, accompanied by the act of relinquishment. 'Hence,' says the court, a 'prospective resignation may in point of law, amount but to notice of an intention to resign at a future day or a proposition to so resign, and for the reason that it is not accompanied by a giving up of the office, possession is still retained and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation; may withdraw his proposition to resign. He certainly can do this at any time before it is accepted, and after it is accepted he may make the withdrawal by the consent of the authority accepting where no new rights have intervened.'"

Vacancies in office clearly cannot take effect until the day named in the prospective resignation, no matter when accepted. Until such date then, there is no vacancy for the Governor to fill, and any attempt to fill the office by a prospective appointment would be clearly contrary to the above constitutional provision.

In answer to your second question, it is our opinion that the Governor cannot make a prospective appointment effective on the day named in your resignation.

III

Section 11518, R. S. Mo. 1929, provides in part as follows:

> "Every sheriff * * * * * shall attend upon all courts of record at every term * * * * * * * * *"

Section 1870, R. S. Mo. 1929, provides in part that:

> "The several sheriffs shall attend each court held in their counties * * * * *."

Section 11513, R. S. Mo. 1929, provides that deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit court:

> "Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 11514, R. S. Mo. 1929, provides the powers and duties of deputy sheriffs:

> "Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

57 C. J., Section 114, page 771, in discussing the duty of the sheriff to attend upon the court, states that:

> "It is the duty of the sheriff when he cannot attend to such duties in person, to appoint deputies to attend upon the terms of the court, and when such deputies are put in charge of juries the term 'bailiff' is applied to them."

We have been unable to find any constitutional or statutory provision which would authorize circuit judges to select their own bailiffs. The extent of their authority is to approve the appointment of deputies selected by the sheriff.

In answer to your third question, it is our opinion that the sheriff has authority to select any deputy, approved by the judge, to attend upon the court as bailiff, provided the latter has fully qualified.

IV

13 C. J., Section 378, page 441, provides in part as follows:

> "The rule is well-settled that where fees or salaries are established for services of public officers, the policy of the law forbids special contracts as to compensation between them and the public. * * * *"

Section 11789, R. S. Mo. 1929, provides in part as follows:

> "For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip... .10"
>
> * * * * * * * * * * * * *
>
> "* * No mileage fees for serving any writ, summons or other legal process

"shall be collected unless the sheriff shall actually travel the distance for which he makes such charge: * * * * * * * * * *"

Section 11792, R. S. Mo. 1929, provides that:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

It is readily apparent that the statutes contemplate that sheriffs be paid "for each mile actually traveled" in serving summons, and not on a monthly basis.

In answer to your fourth question, it is our opinion that a sheriff is forbidden to enter into an agreement to be paid a stipulated sum monthly for mileage in the service of summons.

V

In the case of State ex rel. v. Boecker, 56 Mo. 17, l. c. 21, the court, in holding that since the Governor had authority to make the appointment in the case of a vacancy, the resignation should be addressed to him and not to the county court, said:

> "As by the terms of the law, the Governor alone has the authority to make the appointment in case of a vacancy, it would seem to follow, that in order to make the resignation operative, it should be addressed to him. This is unquestionably the general principle, that when power is bestowed upon a particular officer, when a vacancy occurs, to fill the same by appointment, that the resignation should be sent to him that he may accept it, and then proceed to the discharge of his functions in the premises. The County Court had no jurisdiction over the matter whatever. There is no authority empowering it to take any steps or authority in the case. The resignation placed on file in the records of the court, was a paper not legally or rightfully there, and had no more effect than if it had been retained in the possession of the defendant."

And in the case of State ex rel. Kirtley v. Augustine, 113 Mo. 21, l. c. 24, the court, after again stating the above rule, points out that no particular form is required for the resignation:

> "And the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the Constitution, this resignation may be in writing or by parol. No

particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office--that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. Edwards v. United States, 103 U. S. 471-474; The People v. Board of Police, 26 Barb. 502; Mechem on Public Offices and Officers, sec. 414, et seq.'"

_____,1940

Honorable Lloyd C. Stark
Governor of Missouri
State Capitol
Jefferson City, Missouri

Dear Sir:

You are hereby advised that I will resign, vacate and surrender the office of Auditor of Buchanan County, Missouri, the ___ day of _____, 1940.

_____

We are of the opinion that the above form of resignation is sufficient.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

_____
COVELL R. HEWITT
(Acting) Attorney-General

MW:Eg

AUTOMOBILE LICENSE: Person may purchase either new or duplicate license plates in case of loss by theft or otherwise.

November 27, 1940 11-29

FILED 81

Hon. A. D. Sheppard
Lieutenant-Colonel, Commanding
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 20, 1940, which reads as follows:

"Please give this office an opinion based on the following facts which have been submitted to this office.

'Suppose that John Jones buys Missouri license plates for his automobile, a Chevrolet sedan, in January 1940. That he operates the automobile upon the highways of this state until about the first of October, then someone steals both license plates. After waiting a day or so and the police having failed to find his stolen plates, Mr. Jones decides to get more license plates. Mr. Jones wants to take an extended trip and to save the embarrassment of being stopped frequently by officers, he decides to buy another set of license plates instead of getting duplicates of the ones stolen. He goes to a deputy license bureau and makes a

request to purchase a new license for his car for the final quarter of the year. The license bureau informs Mr. Jones that before they can sell him license plates he must make an affidavit that his car has not been operated on the highways this year, which Mr. Jones cannot do. He is thereby forced to order duplicate plates and operate his car without license while waiting for his duplicate plates to arrive.

'Please inform us if it would be legal for Mr. Jones to purchase quarter year license for his automobile after his original license were stolen, or if he would have to purchase duplicate plates, and if legal to purchase new license what procedure he should follow.

'This question has come up frequently and some of the license bureaus have sold applicants quarter year license, while other bureaus have refused to do so.'"

Section 770 Laws of Missouri, 1935, at page 297, provides in part as follows:

"(a) The commissioner shall, without expense to the owner, issue and deliver to him such number plates bearing the abbreviated name of the state and the number assigned as may

be necessary to properly carry out the provisions of this article. Such plates shall be metal and of a different color or shade each year and there shall be a marked contrast between the color of the numbers thereon and the background of said plates. Figures on said plates shall not be less than four inches in height and the strokes thereof not less than three-eighths of an inch in width: Provided, that in case of motorcycles and motor-tricycles said letters and figures shall be not less than one inch in height and the strokes thereof one-eighth of an inch in width. The commissioner may provide for the arrangement of such numbers in groups, or otherwise, and for other distinguishing marks on such plates.

* * *

"(e) No person shall operate a motor vehicle or trailer on which there is displayed on the front or rear thereof any other plate, tag or placard bearing any number except the plate furnished by the commissioner or the placard herein authorized, and the official license tag of any municipality of this state, nor shall there be displayed on any motor vehicle or trailer a placard, sign or tag bearing the words 'license lost,' 'license applied for,' or words of similar import, as a substitute for such number plates or such placard."

It will be noted in reading subdivision (a) that the commissioner shall, without expense to the owner, issue and deliver to him such number plates bearing the name, or the abbreviated name, of the State and the number assigned as may be necessary to properly carry out the provisions of this article. At no place in this section, or in the motor vehicle law, is it directly stated that a person shall be limited to the number of license plates that he shall be able to purchase.

Section 7774, Laws of Missouri, 1939, page 518, provides in part as follows:

> "(a) Upon the transfer of ownership of any motor vehicle or trailer its certificate of registration and the right to use the number plates shall expire, and the number plates shall be removed at the time of the transfer of possession, unless the seller shall give the buyer written permission to use such number plates for a period of five days, in which event the buyer shall have and display on demand of any proper officer said written consent of the previous owner. The buyer shall remove such number plates at the expiration of said five days, and return them to the previous owner of the motor vehicle, and it shall be unlawful for the buyer, or any person other than the person to whom such number plates were originally issued, to have the same in his possession after the expiration of such five days, whether in use or not: Provided, however, that in the case of a transfer of ownership the original

> owner may register another motor vehicle under the same number, upon the payment of a fee of $2.00, if such motor vehicle is of horse power or tonnage not in excess of that originally registered; or upon the payment of a fee of $2.00 and the difference between the fee originally paid and that due in case the new motor vehicle is of greater horse power or tonnage."

It will be noted in the aforesaid subdivision (a), that upon the transfer of ownership of any motor vehicle, or trailer, its certificate of registration and the rights to use the number plates shall expire, and the number plates shall be removed at the time of the transfer of possession, unless the seller shall give the buyer permission to use such number plates for a period of five days. Provided, however, that in case of a transfer of ownership the original owner may register another motor vehicle under the same number upon payment of a fee of two dollars. From the reading of this subdivision it is the intention of the law that all motor vehicle license plates shall remain in the possession of the person who purchases them and whenever the motor vehicle, which is described in the application, for which the plates were purchased shall be sold, then the person shall keep his license plates and shall not sell them, and if he has another motor vehicle he shall pay the fee of two dollars to have them transferred to that motor vehicle. Should the motor vehicle be of a larger horse power, then he shall pay the corresponding increase that he would have paid in the first instance for the license.

Section 7771 R. S. Missouri, 1929, provides as follows:

> "In the event of the loss, mutilation or destruction of any certificate of

> registration, certificate of ownership, number plate or badge issued by the commissioner, the lawful holder thereof may, upon filing with the commissioner an affidavit showing such fact, and on the payment of a fee of $1.00 obtain a duplicate of such plate, certificate or badge."

It will be noted in the aforesaid section 771 that the lawful holder thereof may upon filing with the commissioner an affidavit showing such fact, and upon the payment of the fee of one dollar, obtain a duplicate of such plate, certificate or badge. As we have pointed out, Section 7770, supra, places the authority and power in the commissioner to regulate, issue and deliver such number plates as will properly carry out the provisions of this article and spirit of the law and, in view of the fact that section 7774, supra, provides that the license shall always be the property of the person who procures them, in the first instance, and that they do not follow the motor vehicle for which they were originally purchased; and, further, that section 7771, supra, which provides that a person may purchase a duplicate plate, or plates, in the case of loss, and there being no provision in the motor vehicle law which affirmatively declares that a person in the case of loss of the license plate shall purchase a duplicate, and no other kind of plate other than the duplicate plate we do not see how it could be reasonably said that should a person who has lost his license plates, through theft or otherwise and desired (because of the reasons set forth in your letter or other reasons) to pay the legal fee as provided under Section 7769 R. S. Missouri, 1929, (as amended, Laws 1933, Ex. Sess., p. 98, sec. 1) instead of paying the nominal charge of one dollar per plate. We think that section 7771, supra, was enacted by the legislature for the sole purpose of placing a nominal charge so that a person who was unfortunate and lost his original plates could procure a duplicate thereof at a nominal charge. Of course

we are aware of the line of reasoning that due to the fact that the legislature, through the passage of this Act, might have meant that it was encumbent upon the commissioner to only allow a person to purchase a duplicate plate in the case of loss and that it was the legislative intent that they should be precluded from the purchase of new plates; but we believe that the liberal and correct construction of this section is that the legislature intended that those who were unfortunate and lost their plates should be allowed to procure a duplicate for a fee much less than an original plate would cost, and we do not think that the legislature intended if a person saw fit, through necessity and expedience, to purchase a new plate and pay the additional cost, to preclude him from doing so.

We note in your letter that you make reference to the affidavit that is customarily presented to persons who seek to buy plates in the latter part of the year. We do not find any section in the law which requires and sets out any form of affidavit as described in your letter, and we presume that this affidavit to which you refer has been properly prepared by the commissioner, as a precautionary method to the end that every person who owns a motor vehicle and operates the same upon the highways of the State of Missouri, shall procure and pay the proper license charge, and cannot be allowed to operate the car on old plates for a portion of the year and then take advantage of the reduced price which is provided by Section 7769, supra.

CONCLUSION.

In conclusion we do not find any legal restriction which would preclude a person who lost his original license plates by theft or otherwise, from purchasing a set of new plates, if he paid the customary charge, or if he desired he could purchase a set of duplicate plates at a reduced price, as provided by Section 7771 R. S. Missouri, 1929.

Respectfully submitted,

APPROVED:

B. RICHARDS CREECH
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

BRC:RW

COUNTY SURVEYORS: A county surveyor, upon being appointed county highway engineer, in counties containing less than 50,000 inhabitants and in which the County Highway Engineer Act is in effect, is entitled to retain his fees as surveyor as well as to receive his salary as highway engineer. The same is true in counties having a population between 20,000 and 50,000 after January 1, 1941.

December 9, 1940

12-13

FILED

81

Mr. J. C. Shelton
Member Clay County Court
Liberty, Missouri

Dear Judge Shelton:

We have your letter of December 3d requesting an opinion upon the following facts:

> Whether your County Surveyor, who has been appointed County Highway Engineer, is entitled to retain his fees as Surveyor as well as to receive his salary as County Highway Engineer.

We assume from your letter that the provisions of Revised Statutes of Missouri, 1929, Chapter 42, Article 8, otherwise known as the "County Highway Engineer Act," is in full force and effect and that the same has not been suspended under the terms of Section 8019. In counties such as Clay, with a population of under 50,000 inhabitants, your County Surveyor upon being appointed County Highway Engineer is not only entitled to a salary within the limits of $300 to $2000 per annum as specified in Section 8008, but he may also retain his fees as County Surveyor under the provisions of Section 8011, R. S. Mo. 1929, as repealed and reenacted by Laws of 1939, page 674, which reads in part as follows:

> "The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided

> he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in Section 8008, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: * * * * * *"

The court in Cummins v. Kansas City Public Service Company, 334 Mo. 672, 66 S. W. (2d) 920, l. c. 931, uses the following language:

> "It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction."

It is, therefore, the opinion of this office that your County Surveyor may retain his fees as Surveyor as well as receive his salary as County Highway Engineer.

In regard to the status of the law after January 1, 1941, this may be said:

The reenactment of Section 8011 (Laws, 1939, page 674) follows the former section verbatim with the exception of the following added proviso:

> "Provided, further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex-officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

In view of this added clause the county surveyor becomes the ex-officio county highway engineer and the court's former privilege of appointment and the surveyor's former privilege of acceptance or refusal are terminated. His salary as ex-officio county highway engineer was increased and fixed within the limits of $1200 to $2000 per annum and the same is compensation for his duties as ex-officio highway engineer.

In State ex rel. Koehler v. Bulger, 289 Mo. 441, the court, in construing what is now the second proviso of our present Act, held that the phrase, "the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court" had reference to ex-officio duties and ex-officio salary only, and that the salary of the ex-officio county engineer should not be less than three thousand dollars in addition to his salary as county surveyor. The court uses the following language (l. c. 451):

> "It specifically mentions the things repealed, but no part of the Surveyor's Act, or the act concerning his salary, are mentioned. So we repeat what we said as to the Act of 1909, that the words 'as county surveyor and ex officio county highway engineer' as used through all these acts has reference to the office and to the duties of the highway engineer, and the pay there mentioned is to cover those duties, and not to cover the duties of the county surveyor as such. For services as county surveyor, the salary is fixed at $3,000 per annum. For 'county surveyor and ex officio county highway engineer' the salary is not less than $3,000 nor more than $5,000. More than the

> minimum of $3,000 cannot be claimed, unless the county court has so ordered. The $3,000 is fixed by law, and must be paid."

It is, therefore, the opinion of this office that after January 1, 1941, in counties having a population of between 20,000 and 50,000 inhabitants and in which the County Highway Engineer Act has not been suspended under the provisions of Section 8019, the county surveyor becomes the ex-officio county highway engineer in accordance with the terms of the last proviso of the statute above quoted (8011), and, in which event, he would also retain his fees as county surveyor.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

FM
RLH:EG

RECORDER OF DEEDS:
DUTIES CONCERNING CANDIDATES' AFFIDAVITS AND COUNTY COMMITTEE'S REPORT ON CONTRIBUTIONS AND EXPENDITURES:

Recorder of Deeds only required to file candidates' affidavits and political committee's reports in his office, for which no charge may be made.

- -

December 11, 1940

12-30

FILED
81

Mr. John P. Sherrod
Recorder of Deeds
Jackson County
Kansas City, Missouri

Dear Sir:

This is in reply to your request submitted to Mr. William Goodman, Assistant Attorney-General of Kansas City, Missouri, wherein you request an opinion of the law with reference to the Jackson County Recorder of Deeds on the following:

"(1) Candidates affidavit of expenditures.

"(2) Statements of County Committees contributions and expenditures.

"Please cover the following information applicable to each:-

"(1) Shall we both file and record the instrument? (by filing I mean to number and index the instruments only, and retain the instrument in our office)

"(by recording I mean to index and copy into our records by the entirety of the written matter therein.

"(2) If we should only file the instrument, what should our charges be?

"(3) If we should file and record the instrument, what should our charges be?"

The office of recorder of deeds being a creature of the statutes, we must look to the statutes creating that office for the powers and duties. This rule is announced in Lamar Township v. City of Lamar, 261 Mo. 171, l. c. 189:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. * * * *"

On the question of the authority of an officer to make a charge for a service, we find that such officer must be able to cite the statute authorizing the making of such charge, and, if he is not able to do this, and the law imposes upon him a duty, then the rendition of such service by the officer would be deemed to be gratuitous. This rule is announced in Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 860:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides com-

> pensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing the same. Such statutes, too must be strictly construed as against the officer. (Citing cases.)
>
> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (Citing cases.)"

It will be noted that statutes authorizing payment of fees to an officer are strictly construed as against the officer. With the foregoing rules in mind, we refer to the statutes creating the office of recorder of deeds and authorizing him to make charges for certain services.

Section 11543, R. S. Mo. 1929, sets out the various instruments which shall be recorded by the recorder of deeds. This section reads as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions

> and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

Section 11545, R. S. Mo. 1929, provides for recording all instruments in writing conveying chattels or personal property which are required to be recorded.

Section 11546, R. S. Mo. 1929, requires the recorder to keep an abstract and index of deeds, showing the grantors and grantees, etc. The instruments referred to in this section are the instruments which the recorder is required to record.

Section 11549, R. S. Mo. 1929, provides for the indexing of such instruments.

Section 11551, R. S. Mo. 1929, requires the recorder to index officer's commissions.

Section 11552, R. S. Mo. 1929, provides for the recording of patents.

Under Article 3, Chapter 22, which contains Sections 3097 to 3102, provisions are made for the filing of chattel mortgages.

Under Section 3099, as amended Laws of Missouri, 1935, page 209, it will be seen that the recorder of deeds is allowed twenty cents for his services for filing and releasing chattel mortgage.

Section 11804, R. S. Mo. 1929, provides for the fees which the recorder may charge for recording and for services in connection with his office. These fees, however, are only chargeable in case the statute authorizes the recorder to make a charge therefor.

Referring to the sections of the statutes pertaining to the filing of candidate's affidavits and statements of

political committees, we find that Section 10482, R. S. Mo. 1929, requires the candidate to file a statement of his receipts and expenditures with the officer empowered by law to issue the certificate of election and a duplicate thereof with the recorder of deeds for the county in which the candidate resides.

Section 10495, R. S. Mo. 1929, requires every treasurer of the political committee to prepare and file in the office of the recorder of deeds of the county in which such treasurer resides a statement of the receipts and disbursements of such political committee.

Section 10496, R. S. Mo. 1929, requires the officer who is required by law to issue certificates of election or commissions to retain these statements for a period of four years. There is no provision in the law for the disposition of these statements which are filed with the recorder of deeds. However, we do not think that the fact that the lawmakers failed to provide for the disposition of these files would be controlling on the question as to whether or not the officer should record these instruments or should make a charge therefor in case no authority is granted by the statute to make such charge or to record such instruments. In our research on this question, we fail to find where the duty is imposed upon the recorder of deeds to record these statements, and, in absence of such a statute we do not think that the party presenting such instrument for filing would be required to have the instrument recorded and to pay therefor.

Following the rule announced in the Nodaway County case, supra, it seems that the lawmakers, since they have made no provision for compensation to the officer for filing these statements, have intended that this service by the officer shall be deemed to be gratuitous.

CONCLUSION.

Answering your questions in the order in which they were submitted:

In answering your first question it is the opinion of this department that the recorder of deeds is only

authorized to file the candidate's affidavit of expenditures and the statement of the county committee's contributions and expenditures.

Answering your second question, in view of the fact that no provision has been made for the recorder to make a charge for the filing of these instruments, it is the opinion of this department that no charge should be made.

Since your third question is answered by the answer to questions one and two, we do not deem it necessary to further comment on that question.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:CP

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

RECORDER OF DEEDS: Loss by theft of county funds on account of burglary.

February 10, 1940

2-14

FILED
82

Honorable John E. Short
Circuit Clerk
Ray County
Richmond, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 7, 1940, which reads as follows:

> "A robbery in the Recorder's office which occurred on Saturday or Sunday night has raised a question as to whom will be liable for the fees which were stolen.
>
> I realize that I am ordinarily responsiole for fees in my office but where I have money in the vault and burglars prize the vault and safe doors open at night and take the money, I question whether I would be responsible to the County for same. I of course make bank deposits during the month but I was caught with over one hundred dollars on hand.
>
> The County Clerk's office was broken into in the same manner the same night, but he didn't have any money in his vault.
>
> I know that the County Court would like to help me in this matter if they feel that they have a right to do so.
>
> I will thank you for an opinion as soon as you can render same."

In the case of State ex rel. The Township v. Powell, 67 Mo. 395, the court quoted with approval the following statement of law as declared in the case of United States v. Prescott, 3 How. 578:

> "Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity."

It will be noted that this excerpt was taken from an opinion wherein the funds had been feloniously stolen, and was a case on all fours with the situation as set out in your question.

In tracing the authorities, we find that in the case of University City v. Schall, 205 S. W. (2d) 631, l. c. 633, the aforesaid cited case was approved by the court. Also, the same was approved in City of Fayette v. Silvey et al., 290 S. W. 1019.

In the case of Glaze ex rel. Board of Supervisors of Harrison County Drainage District v. Shumard, 54 S. W. (2d) 726, l. c. 728, 227 Mo. App. 434, the court, in opinion, had this to say:

> "Since it is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise, * * * the depositing of such funds by the county treasurer and ex officio collector, to his account as county treasurer in the Bethany Savings Bank, <u>was at his peril</u>."

The Court also cites with approval University City v. Schall, supra; Bragg City Special Road District v. Johnson, 323 Mo. 990, 20 S. W. (2d) 22; Butler County v. Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047.

It is indeed a regrettable situation with which you are confronted, but, upon examination of the foregoing authorities, as laid down in the case of State ex rel. Township v. Powell, supra, clear down to the present date, the courts have, without exception, held that county officers are liable for the moneys that are placed in their hands in their official capacity.

Therefore, in conclusion, it is the opinion of our department that you, as recorder of deeds for the county of Ray, are liable for the moneys that were taken from you through the burglarizing of the vault in which you had said moneys.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:VC

CIRCUIT COURT REPORTER - Salary in 31st District.

January 8, 1940

1-11

FILED
83

Mr. Ramey Smith
County Clerk
Douglas County
Ava, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 4, 1940, which reads as follows:

> "We have been faced, during the year 1939, with a problem in connection with the amount and method of paying the salary of our Circuit Court Reporter.
>
> "When we were audited last time the State Auditor found our Court Reporter to be drawing a salary of $3000.00, when in his opinion the law only allows our Court Reporter a salary of $2500.00. We were advised by your office and by the State Auditor that we should only budget our Court Reporter our proportional part of $2500.00 which we did. At the same time we transmitted a certified copy of a County Court Order to this affect to our Circuit Judge and one to our County Treasurer. The Circuit Judge, however has persisted in issuing the Court Reporter his Script in the same manner and amount as was done in previous years.
>
> "The County Clerk of Howell County tells me that in that county the Circuit Judge's Script is presented to the County Court as a claim and the County Clerk issues a County Warrant on Class 4 funds for same.

However, in this county the Circuit Judge issues the Court Reporter his Script which is presented to the County Treasurer for payment, and the County Court of this county has nothing at all to do with payment of the Court Reporters Salary or Expense.

"Now, what we want to know is:-
.Should the Court Reporter present his SCRIPT, issued by the Circuit Judge, to the County Court and in turn get a County Warrant on Class four fund or should the County Treas. honor the Circuit Judges SCRIPT?

"In case the County Treasurer is required by law to honor the Circuit Judges SCRIPT:-
How are we to keep from paying our Court Reporter in excess to the amount allowed him by the Statutes? Should the Treas. protest or pay warrants above the amount budgeted by the Co. Court?

"The County Court and myself were in your office once in regard to this same matter, however we did not know at that time, that the Circuit Judge would continue to issue Script after the Court Reporters budget was exhausted.

"Thanking you for your cooperation in the past trusting that we may have your opinion in this matter in time for consideration in preparing our budget for this year."

Section 11720 R. S. Missouri, 1929, provides for salary of circuit court reporters, and reads in part as follows:

"Court reporter shall receive salary as follows: In cities, or counties

> which now have and such as may hereafter have a population of sixty thousand or more, an annual salary of three thousand dollars, payable in equal monthly installments out of the city or county treasury on the certificate of the judge of the court in whose division such court reporter is employed. In counties having a population of forty-five thousand and less than sixty thousand inhabitants, an annual salary of two thousand five hundred dollars, payable in equal monthly installments out of the county treasury on the certificate of the judge in whose court he is employed. * * * "

The term "counties" used in connection with the population figures in Section 11720, supra, actually means circuits. See State ex rel Geaslin v. Walker, 257 S. W. 470, and Graves v. Walker, 23 S. W. (2d) 1107. It is apparent, then, from the above, that the salary of a circuit court reporter, when the circuit is composed of several counties, depends upon the total population of all the counties in the circuit. The problem which now arises is that of the method to be used to determine the population of each county in the circuit for purposes of arriving at a total, in order to apply Section 11720, supra. Section 11808, Laws of Missouri, 1933, page 370, reads as follows:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

In State ex rel Rucker v. Hoffman, 294 Mo. 429, the court held that a circuit court reporter was a "county officer" for purpose of fixing salary. It would seem, then, that we should use the method provided in Section 11808, supra, in order to arrive at the total population of the circuit. According to the 1930 census in the official manual, State of Missouri, 1937-1938, page 220, the populations of the respective counties in your circuit are as follows:

Christian	13,169
Douglas	13,959
Ozark	9,537
Stone	11,614
Taney	8,867
Total	57,146

We see from the above figures that the total population of the counties in the 31st Circuit is more than 45,000 and less than 60,000. By applying the provisions of Section 11720, supra, the circuit court reporter in your circuit is entitled to $2500.00 a year.

Having disposed of the above preliminary matter, we shall now proceed to render you an opinion on your precise questions as set forth in your request.

Your first question reads as follows:

> "Should the Court Reporter present his SCRIPT, issued by the Circuit Judge, to the County Court and in turn get a County Warrant on Class four fund or should the County Treas. honor the Circuit Judges SCRIPT?

This office had occasion to rule on that question October 29th, 1935, in response to a request from Hon. Lewis A. Duval, Prosecuting Attorney, Macon, Missouri. We are enclosing a copy of the Duval opinion in answer to your question as to method of payment of the salary of a circuit court reporter.

Your second question reads as follows:

> "How are we to keep from paying our Court Reporter in excess to the amount allowed him by the Statutes? Should the Treas. protest or pay warrants above the amount budgeted by the Co. Court?"

In our opinion, the court reporter is receiving a salary in excess of the statutes, and you should refuse to honor the script in excess of the amount deemed to be the legal salary. The burden would then be on the court reporter to establish his claim for the alleged excess by appropriate action.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RPCW:RW

TAXATION: Chapter 59, Article 17, providing for taxation of merchants, must be followed and no other method under any other chapter should be followed for this purpose.

January 11, 1940

1-15

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 3, 1940, which reads in part as follows:

> "The 60th General Assembly amended Section 10094, said amended section being found in Laws of Missouri, 1939, page 854. The amended section provided that when the collector had shown to the court that due diligence had been exercised in the collection of outstanding merchant's taxes and that the same was uncollectable; the court could allow the collector credit for the amount thereof.
>
> "That amended section creates some questions upon which we would like your opinion."

I

You further inquire as follows:

> "We would like to know if the statutes present a legal construction on what the court should require from the col-

lector to indicate the exercise of due diligence in this matter."

Section 10087, R. S. Missouri, 1929, reads as follows:

"Every person, corporation or copartnership of persons, to whom a license shall have been granted to vend goods, wares and merchandise, who has filed a correct statement as herein required, and failed to pay the amount of revenue so owing to the collector of the proper county, shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

Section 10090, R. S. Missouri, 1929, reads as follows:

"Upon the forfeiture of any bond as provided, it shall be the duty of the collector of the proper county to institute suit without delay, by some attorney to be selected by him, upon the bond forfeited, against the principal and all sureties, jointly or severally, as may be deemed advisable; and the court in which the judgment shall be rendered shall, if judgment shall be for the plaintiff, tax as costs in the case to be collected and paid as other costs, a reasonable fee in favor of the attorney prosecuting the action."

Section 10094, as amended, appearing in Session

Laws of 1939, page 854, reads as follows:

> "The county court, at each regular term thereof, shall settle and adjust the accounts of the collector for licenses delivered to him, giving him credit for all blank licenses returned, and charging him for all licenses not returned, according to the statement required to be filed by the person having license, and the statement of the bonds required to be returned. Provided, however, that when the collector shows that he has exercised due diligence to collect outstanding merchants taxes against the merchant and upon his bond or bondsmen and that the same is uncollectible, the county court, upon a showing of said facts may allow the collector credit for the amount thereof."

Section 10090, supra, specifically states the procedure that a collector should take upon the forfeiture of the bond, as provided in Chapter 59, Article 17, R. S. Missouri, 1929. It will be noticed, also, that that procedure must be followed by instituting a suit without delay.

18 C. J. 1039, reads as follows:

> "Due diligence. Appropriate, fit, proper diligence--that is, ordinary diligence; due care, such diligence as ordinarily prudent men would use; such watchful caution and foresight as the circumstances of the particular service demand; 'doing everything reasonable, not everything possible.' The term is nearly synonymous with 'reasonable diligence.'"

In the case of Chicago, etc., R. Co. v. U. S., 194 Fed. 342, 344, 114 CCA 334, the court said:

> "The measure of 'due diligence and foresight' is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the twenty-eight-hour law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances. An 'accidental or unavoidable cause' which cannot be avoided by the exercise of due diligence and foresight in the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid."

In view of the above authorities, it is the opinion of this Department that the county court should require the collector to bring an action upon a bond forfeiture without delay as set out in Section 10090, supra, and that when the county collector has followed this procedure, he has exercised due diligence to collect the outstanding merchant taxes against the merchants and upon a showing that the taxes are uncollectable the collector should be allowed credit for the amount thereof.

II

Your second inquiry reads as follows:

> "Including the amendments to the statutes concerning the collection of merchants' and manufacturers' taxes, there is still no provision for collection of a merchant's tax as a delinquent tax. Section 10090 R. S. Missouri, 1929, instructing the collector that he shall 'institute suit without delay by some attorney to be selected by him upon the bond forfeited against the principal and all sureties, * * *.' If such a suit has been instituted by a collector, but before a judgment could be obtained the merchant goes to the collector's office and tenders to pay his tax, should the collector accept the payment of the original tax or should he require the payment of additional interest, penalties, and/or attorney's fees and other costs incurred in filing the suit? If the collector should not collect these costs, who will be liable for them?"

Under Section 10090, supra, it is mandatory upon the collector to institute suit without delay upon the forfeited bond and if judgment shall be for the plaintiff the costs should be taxed and a reasonable fee in favor of the attorney prosecuting the action, the same as other costs in any other civil action. Upon the filing of a suit the only way that the suit can be released is by a satisfaction of the record as to the cost and attorney's fees. It is the duty of the collector to collect these costs and even before judgment under Section 10090, supra, the costs have accrued and he must collect the costs before the case can be satisfied of record. If the collector has failed to collect the costs in these cases, where a suit has been filed, he could still hold the taxpayer for the costs, for the reason that the case upon which the suit had been filed is not released by the payment of the tax only to the collector.

III AND IV

Your third inquiry reads as follows:

> "Chapter 59, Article 17, R. S. Missouri, 1929, prescribes the full procedure in the taxation of merchants. This procedure requires a sworn statement to be made by the merchant, which statement shall set forth the value of the greatest amount of goods 'on hand at any one time between the first Monday in March and the first Monday in June.' If the merchants' tax book is certified to the collector containing tax extensions against merchants which carry the notation that the valuation upon those taxes as extended are based upon an estimate made by the Assessor, what is the status of such tax items; and what is the liability of the collector on such items?"

And your fourth inquiry reads as follows:

> "If a collector refuses to issue a license to a merchant because that merchant refuses to give him a good and sufficient bond and yet the merchant makes a statement to the Assessor for taxation purposes, what is the status of the tax extended upon that statement and what is the liability upon the collector?"

Section 10088 R. S. Missouri, 1929, reads as follows:

> "Every such person, corporation or copartnership of persons, who shall fail to file such statement, and at the time and in the manner required, shall be deemed to have forfeited the bond given by him or them, in virtue of this article, and judgment shall be rendered for the plaintiff in damages for three times the amount of revenue which shall be found to be due for the year, and costs."

Section 10098, R. S. Missouri, 1929, reads as follows:

> "It shall be the duty of the several collectors to call at least as often as once in every three months on all merchants who are required by law to take out license, and to offer to furnish such as have not a license, with a license; and the said collector shall report to each grand jury of his county the names and localities of all persons who refuse to take out or renew their license at the proper time as required by law."

Under Section 10088, supra, if the taxpayer should fail to file a statement in the manner required, he shall be deemed to have forfeited the bond given and immediate action should be taken under Section 10090, supra.

Under Section 10098, supra, it is the duty of the county collector, at least every three months, to call upon all merchants who are required by law to take out license.

Chapter 59, Article 17, R. S. Missouri, 1929, specifically prescribes the method of taxing merchants and should not be confused with other taxation chapters. This is a special statute as to the taxation of merchants

and unless the merchant follows specifically the method of filing bonds and making returns, he may also be prosecuted under Section 10076, R. S. Missouri, 1929, which reads as follows:

> "No person, corporation or copartnership of persons shall deal as a merchant without a license first obtained according to law; and every person so offending shall forfeit to the state not less than fifty nor more than five thousand dollars for every such offense, to be recovered by indictment or information."

In the case of Collins v. Twellman, 126 S. W. (2d) 231, l.c. 233, the court said:

> "* * Appellant concedes that when one of two conflicting statutes must prevail then all else being equal a special statute must take precedence over the general law; also that all else being equal later statutes take precedence over earlier statutes."

In the case of State ex rel v. Horton Land and Lumber Company, 161 Mo. 664, l.c. 671, the court said:

> "This, as well as other points made for reversal, are founded upon a misconception of the nature of the action. This is not an action for the recovery of the taxes of 1896, nor for the recovery of damages under section 6904, for failure to pay the amount of the taxes for that year, levied in accordance with a correct statement filed by the lumber company as required by law, but for damages under section 6905, for the failure of the lumber company to file

> the statement required by law, whereby such taxes might have been assessed, levied and collected in the manner provided by law. The character of the action is determined by the facts stated in the petition and not by the prayer for relief. The bond covered not only damages under section 6904, for failure to pay such taxes, when so assessed and levied, but also damages under section 6905, for failure to file the proper statement whereby they might have been so assessed , levied and collected. Hence, the court committed no error in overruling defendant's objection to the introduction of evidence in support of the petition, and committed no error in admitting evidence tending to prove the value of raw material and finished products on hand on any one day between the first Monday in March and the first Monday in June, 1896, and of the tools, machinery and appliances used in conducting their business or owned by them on the first day of June, 1896."

Section 6904, set out in the above quotation is now Section 10087, R. S. Missouri, 1929.

Section 6905, as set out above is now Section 10088, R. S. Missouri, 1929.

In the case of State v. Brown, 33 S. W. (2d) 104, par. 2-6, page 107, the court said:

> "'A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding.

> Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R. C. L. sec. 14, pp. 766, 767."

Section 10087, supra, and Section 10090, supra, and Section 10094, 1939, page 854, supra, are mandatory provisions and under the holding in the above case. This being a mandatory provision the taxpayer can only release himself by following the procedure set out in Chapter 59, Article 17, R. S. Missouri, 1929. The taxpayer cannot release himself of this liability by following any other taxation chapter.

In the case of Morris v. Karr, 114 S. W. (2d) 962, l.c. 964, the court said:

> "* * 'Generally speaking, those provisions which do not relate to the essence of the thing to be done

> and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.'"

Under the holding in the above case Section 10087, Section 10090 and Section 10094, as it appears in 1939 Session Laws, page 854, are mandatory and must be followed.

In the case of State v. Smith, 111 S. W. (2d) 513, par. 5, the court said:

> "'It is a generally accepted rule that taxing statutes should be strictly construed in favor of the taxpayer, and such is the rule in this state.' State ex rel National Life Insurance Co. v. Hyde, 292 Mo. 342, loc. cit. 352, 241 S. W. 396, 399. See, also, State ex rel. Compton v. Buder, 308 Mo. 253, 271 S. W. 770, and State ex rel. Koeln v. Lesser, supra."

Under the holding in the above case taxing statutes should be strictly construed in favor of the taxpayer, and in case a suit is brought upon an estimate made by the assessor it would not be successful, for the reason that the assessor is following the general law and not the special statute, in regard to taxation of merchants.

In the case of Kroger Grocery & Baking Company v. City of St. Louis, 106 S. W. 2d 435, par. 5-7, the court said:

> "Summarizing the reasons underlying Kansas City v. J. I. Case T. M. Co., supra, on the instant issue, they are to the effect, in so far as material here, that said act of 1879 conferred a permissive, not mandatory,

> power upon certain municipalities to impose a graduated license upon merchants; but (considering the word 'may' in said clause authorizing a graduated license as equivalent to 'must' or 'shall' (Id., 337 Mo. 913, loc. cit. 931 (8), 87 S. W. (2d) 195, loc. cit. 205 (15-17))), any attempt to exercise the authority there conferred to exact graduated license fees must be exercised in conformity with the authority delegated and graduated in proportion to the annual sales (Id., 337 Mo. 913, loc. cit. 930 (7), 87 S. W. (2d) 195 loc. cit. 205 (13,14), and authorities cited; Keane v. Strodtman (Banc) 323 Mo. 161, 167 (11), 18 S. W. (2d) 896, 898 (11) (quoting Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S. W. 112, 113, to the effect that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unious est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out'); State ex rel. v. Clifford, 228 Mo. 194, 207, 128 S. W. 755, 758, 21 Ann. Cas. 1218."

Under the holding in the above case the court held that when a special method is prescribed for taxation for any purpose it forbids the taxing under any other method and if taxed under any other method it forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out. Chapter 59, Article 17, R. S. Missouri, 1929, specifically sets out the method of taxation of merchants and under the holding in the above case any other method will be null and void.

CONCLUSION

In view of the above authorities, it is the opinion of this Department that if a merchant's tax book is certified to the collector, containing tax extensions against merchants which carry the notation that the valuation upon these taxes as extended are based upon an estimate made by the assessor, this extension of taxes is absolutely void, for the reason that it does not follow the method and procedure as set out in Chapter 59, Article 17, R. S. Missouri, 1929.

It is further the opinion of this Department that the collector is not liable upon such items as extended by the assessor.

It is further the opinion of this Department that if a collector refuses to issue a license to a merchant because that merchant refuses to give him a good and sufficient bond and yet the merchant makes a statement to the assessor for taxation purposes, extension of such a tax under those circumstances is absolutely void and creates no liability upon the collector.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

PENSIONS: Judgment for old age assistance for 1937 and 1938 may be paid out of the appropriation for the payment of old age assistance or pensions for the years 1939 and 1940.

OLD AGE ASSISTANCE:

January 11, 1940

1-15

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of December 11, 1939.

Restating your request - On the 30th day of November, 1937, Maude Gibbons Galvin was removed from the old age assistance roll by the State Social Security Commission for the reason that she was not 70 years of age. This claimant duly appealed to the Commission for a hearing, and after the hearing, the Commission refused to reinstate her on the roll. An appeal was duly taken to the Circuit Court and that court ruled that the claimant was 70 years of age in November, 1937, and was qualified in every other respect for old age assistance and restored her to the roll as of November 30, 1937. The State Social Security Commission appealed from this finding and the Kansas City Court of Appeals affirmed the decision of the lower court and overruled a Motion for a Rehearing on June 19, 1939.

You now inquire as to whether or not you can legally draw a warrant on the state treasury payable to Maude Gibbon Galvin for old age assistance for the period from November 30, 1937 to December 31, 1938, upon proper requisition of the State Social Security Commission.

The Springfield Court of Appeals in the case of Hughes v. State Social Security Commission of Missouri, 128 S. W. (2d) 671, l. c. 673, in holding that the trial court was within its jurisdiction in restoring said claimant to the roll as of the date she was stricken therefrom, said:

> "We also think and hold that the trial court was within its jurisdiction in holding as of the date of the trial October 20, 1938, that the applicant 'is entitled to all the assistance which she was drawing at the time of being stricken from the rolls.' "

Also, the Kansas City Court of Appeals in the case of Galvin v. State Social Security Commission of Missouri, 129 S. W. (2d) 1051, l. c. 1053, said:

> "We conclude that when the court adjudged that respondent be restored to the roll the law wrote into the judgment that such restoration was of the date of the erroneous removal and that the words in the judgment, 'as of November 30, 1937', were unnecessary and added nothing to the force of the judgment."

Therefore, there is no question as to the legality of the judgment.

The question boils down to this. Can this judgment be legally paid out of the 1939-40 appropriation as passed by the Sixtieth General Assembly for the payment of old age assistance or pensions?

The fact that it did not become an obligation on the state until June 19, 1939 as contended by the

State Social Security Commission will not be passed upon at this time for the reason that it is of no importance now since same can not be paid out of the 1937-38 appropriation for the reason that the appropriation lapsed on the last day of December, 1938. The law is well established that an appropriation act expires at the expiration of two years unless it is made a continuing appropriation, and in this case that was not done.

Article 10, Section 19 of the Missouri Constitution provides that no money shall ever be paid out of the state treasury except in pursuance of an appropriation, and further prohibits the payment out of any appropriation after the expiration of two years. Article 10, Section 19 of the Constitution of Missouri reads as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

In State ex rel v. Hays, 49 Mo. 604, l. c. 605, in holding that the treasurer should not honor any warrant drawn without an appropriation when said appropriation is exhausted, the court said:

> "The treasurer cannot be required to pay out the funds intrusted to his keeping unless appropriated; as the minister of the State, with no discretionary powers, he must disburse when and as, and only when and as, the law-making power shall direct. (Const. Mo. Art. XI, Sec. 6) He usually looks only to the warrant, but is not bound by that if drawn without an appropriation. And if an appropriation lawfully made be exhausted, his payments must necessarily stop. Hence that part of the return denying, in effect, that there is money in the treasury appropriated for the purpose, furnishes a complete excuse for his refusal."

Also, in State v. Holladay, 64 Mo. 526, l. c. 527, the court, in holding that an appropriation possesses no validity, force or even exists after the lapse of two years, and that a warrant cannot be drawn without an appropriation, said:

> "From a consideration of these two sections, it seems quite obvious that no appropriations of money find recognition in the constitution except 'regular appropriations,' and that such cannot be made except at regular legislative sessions, occurring biennially. This view of the matter receives abundant confirmation in the prohibitions of section 19 of article X, that 'no moneys shall ever be paid out of the treasury of this

> State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued, therefor, within two years after the passage of such appropriation act, and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object,' etc.
>
> "The act of March, 1870, is clearly inconsistent with the provisions of the consitution above quoted, and in consequence thereof, and in conformity with what the schedule ordains, the provisions of that act ceased when the constitution was adopted. For although the sections of the constitution just cited, do not in express and direct terms inhibit the auditor from drawing his warrant in favor of a claimant who relies on an appropriation more than two years old, yet those sections, by necessary and inevitable implication, accomplish the same result; for it cannot, with any show of reason, be claimed that a warrant can be drawn without an appropriation; but as just seen, no appropriation possesses any validity, force, or even existence, after the lapse of two years."

Likewise, in the case of State ex rel. v. Gordon, 236 Mo. 142, l. c. 157 and 158, the court in holding that the treasurer is prohibited from paying any warrant out of any fund under his management, except in pursuance of regular appropriation made by law, said:

"We cannot agree to that contention. It is provided by section 43, article 4 of the Constitution of this State that: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit any money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' And by section 19, article 10, that: 'No moneys shall ever be paid our of the treasury of this State, or of any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object.'

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would relator be entitled

to the audit and allowance of his accounts for salary and expenses."

Therefore, since it is useless to look to the appropriation for 1937 and 1938 in payment of this judgment for the reason same has expired, we will examine the appropriation act for payment of the old age assistance as passed by the Sixtieth General Assembly, and found on page 97, Laws of 1939, to determine if this judgment may be paid out of that appropriation, or if that act restricts the payment of Old Age Assistance to such assistance that may accrue for the years 1939 and 1940, Said appropriation act, including the title, reads in part as follows:

"AN ACT appropriating money to the State Social Security Commission, complying with an Act passed by the 59th General Assembly - 1937 Laws of Missouri, pages 467 to 478 inclusive and as amended by Acts of the 60th General Assembly creating a Social Security Commission, and defining its duties as follows: Pensions or assistances to persons 65 years of age or over, who are incapacitated from earning a livelihood and are without means of support, aid to dependent children, aid or relief in cases of public calamity, administration of purposes of said Act, Child Welfare services, and for the care of the Children's Home at Carrollton for the years 1939 and 1940, with an emergency clause.

"Old age assistance, aid to dependent children, aid or relief in case of public calamity. There is hereby appropriated out of the State Treasury, chargeable to

the General Revenue fund, the sum of Twenty-nine Million Seven Hundred Fifty Thousand Dollars ($29,750,000.00) payable to the State Social Security Commission, complying with an Act passed by the 59th General Assembly - 1937 Laws of Missouri, pages 467 to 478 inclusive and as amended by Acts of the 60th General Assembly creating a Social Security Commission and defining its duties as follows:

"Pensions or assistance to persons sixty-five years of age or over, who are incapacitated from earning a livelihood and are without means of support.....$17,500,000.00

Aid to Dependent Children.....3,250,000.00

Aid or relief in case of public calamity.....6,500,000.00"

In the case of State ex rel. Smearing v. Thompson, 45 S. W. (2d) 1078, l. c. 1078 and 1079, a similar question was raised with reference to the payment of a blind pension. In that case the claimant was removed from the roll on April 1, 1926. Thereafter, on January 11, 1929, the Blind Commission ordered her name restored to the roll as of September 12, 1928, from which date a regular quarterly payment was made to said claimant. Thereafter, on May 8, 1931, the Blind Commission ordered said claimant to be reinstated on the roll as of April 1, 1926. However, in that case the State Auditor refused payment of the pension for the period between April 1, 1926, the date she was removed from the roll, and September 12, 1928, the date she was restored thereon,

for the reason that the current appropriation was not available for that purpose. In that case the appropriation act was very much like the appropriation act for the payment of old age assistance for the years 1939 and 1940.

The court, in that case, held that the claimant was entitled to receive her pension between those dates hereinabove referred to, out of the current appropriation for the reason that the object of the appropriation act was to pay pensions to deserving blind as provided in Chapter 51 of the Revised Statutes of Missouri, 1929, and that the following language used in the title of the appropriation act

> "for the biennial period beginning on the first day of January, 1931, and ending on the 31st day of December, 1932,"

merely limited the period within which the appropriation was available in conformity with Section 19 of the Constitution of Missouri, and has no reference to the time when the right to said pension for the payment of which the appropriation is made, should accrue. The court, in so holding, said:

> "The Appropriation Act in question is entitled: 'An Act appropriating money to pay salaries, wages and per diem, for the original purchase of property, for the repair and replacement of property, for the operative expenses and other purposes of the commission for the blind, and to pay pensions to the deserving blind, for the biennial period beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1932, with an emergency clause.' (Laws 1931, p. 64.)

"Section 2 of the act is as follows: 'There is hereby appropriated out of the state treasury, chargeable to the blind pension fund the sum of two million five hundred thousand dollars ($2,500,000.00) or so much thereof as may be needed to pay pensions to the deserving blind as provided for in chapter 51, Revised Statutes, 1929.'

"Section 19, article 10, of the Constitution provides: 'No moneys shall ever be paid out of the treasury of this State, * * * except in pursuance of an appropriation by law; nor unless such payment be made * * * within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied.'

"The only question here is whether the payment which relatrix seeks to have made out of the state treasury is within the 'object' to which the appropriation under the act just set out is to be applied. If it is a 'pension to the deserving blind as provided for in Chapter 51, Revised Statu es, 1929,' it is. The language in the title of the Appropriation Act, 'for the biennial period beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1932,' if read into the act itself, merely limits the period within which the appropriations made shall be available, in conformity with said section 19 of the Constitution; it has no reference to the time when the right to the pensions for the payment of which the appropriation is made should accrue or had accrued, nor to the period for which such pensions are payable."

The Appropriation Act passed by the Sixtieth General Assembly for payment of the old age assistance or pensions follows the appropriation act for the payment of blind pensions just quoted. The title in the appropriation act for the payment of old age assistance for the years 1939 and 1940 in part reads as follows, "for the years 1939 and 1940."

CONCLUSION

Therefore, in view of the judgment of the Circuit Court restoring this claimant to the old age assistance roll as of November 30, 1937, the Kansas City Court of Appeals, affirming said judgment and the construction placed upon an appropriation act in State ex rel. Smearing v. Thompson, very similar to the one in question by the Supreme Court en banc, holding that blind pensions accruing for 1926, 1927 and 1928 may be paid out of the biennial appropriation for 1931 and 1932, it is the opinion of this Department that any part of this unpaid judgment should be paid out of the 1939 and 1940 appropriation act as passed by the Sixtieth General Assembly for the payment of old age assistance or pensions.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

ARH:RV

COUNTY COURTS: Salary of county courts in counties having 75,000 inhabitants and less than 90,000 inhabitants.

January 17, 1940

1-18

FILED 83

Hon. George H. Skidmore
Asst. Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 22, 1939, requesting an opinion from this Department, which reads as follows:

> "A simple disagreement as to the meaning of two statutes has occurred, and I feel justified in asking your office for an interpretation.
>
> "Section 11780 regulating the fees of county judges provides 'for solemnizing marriages $2.00.' Laws of 1933 at page 375 provides that in counties of the class of Greene County, the county judges shall receive a salary of $2700.00 annually, and the conclusion of said section is as follows: 'said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind under and by reason of the terms of any statutory provision outside of this article.'

"The question I would like your views on is as to whether a county judge in Greene County, if he solemnizes a marriage, may retain the $2.00 fee for himself, or whether he is required to turn it in to the county trasury."

Under Section 2976 R. S. Missouri, 1929, the county court is authorized to solemnize marriages and for this service a fee of $2.00 is allowed. Said section reads as follows:

"Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of anda pastor of any church in this state."

Section 11780 R. S. Missouri, 1929, reads as follows:

"The judges of the county court shall receive for their services as follows:

For taking every acknowledgment of a deed or other instrument of writing...	$0.50
For oath and certificate to affidavit.....	.25
For solemnizing marriages.....	$2.00
For an ordering suspending sale of personal estate.....	.75
For granting and drawing a writ of habeas corpus, and deciding thereon	3.00
For each day actually engaged in holding court.....	5.00

> For each mile neceasarily traveled in going to and from the place of holding such court..... .05"
>
> "Provided, that such mileage shall be charged only once for each term of court."

Therefore, unquestionably the county court receives this fee for solemnizing marriages and same is received by virtue of his office for services rendered.

Now the question, shall the county court of Greene County retain the $2.00 for himself or is he required to turn same into the county treasury?

The 57th General Assembly enacted House Bill #263, page 375, Laws of 1933, Section 1 of which provides the salary certain county officers shall receive in counties which now contain or may hereafter contain a population of 75,000 inhabitants and less than 90,000 inhabitants. Under this provision judges of the county court shall receive $2700 each per annum. Section 1 of said act reads as follows:

> "From and after the passage and approval of this section, the following salaries per annum shall be paid the hereinafter named officers of all counties in this State, which now contain, or may hereafter contain, a population of 75,000 inhabitants, and less than 90,000 inhabitants, viz: Collector of Revenue four thousand ($4,000.00) dollars; Judges of the County court twenty-seven hundred ($2700.00) dollars each; Clerk of the Circuit Court four thousand ($4,000.00) dollars; Clerk of the County Court four thousand ($4,000) dollars; Recorder of Deeds thirty-two hundred ($3200.00) dollars; County Treasurer

> thirty-two hundred ($3200.00) dollars; County Assessor four thousand ($4000.00) dollars; all of said salaries to be paid in monthly installments on the first day of each month from the available funds of the County Treasury. Said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind under and by reason of the terms of any statutory provisions outside of this article."

The last sentence of the above provision provides that "Said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind under and by reason of the terms of any statutory provisions outside of this article." which we conceive clearly restricts the county court from retaining any fee or part thereof as a part of his salary.

In Johnson, Clerk of Board v. Deuser, County Treasurer, et al. 56 S. W. (2d) 803, l. c. 805, the Court in construing Section 2092 R. S. Missouri, 1929, pertaining to salaries of the County Court in counties now or hereafter having 150,000 inhabitants and less than 300,000 inhabitants which contains a similar provision to the one in question and in part reads as follows:

> "* * *. In all counties of this state now or hereafter having ninety thousand inhabitants and less than one hundred fifty thousand inhabitants, the judges of the county court shall receive an annual salary of three thousand dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, as provided by section 7894. In all counties of this state now or hereafter

> having one hundred fifty thousand inhabitants and less than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of forty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929, and in lieu of all other fees, compensation, or salaries, heretofore allowed by law to said judges, except the per diem as allowed to said judges as members of the board of equalization and board of appeals."

held that such a statutory provision allowing judges of the county court to receive a certain salary in lieu of the fees therefor allowed, nullifies the statute giving them as members of the Board of Plumbing Inspectors surplus fees. In so holding, the court said:

> "Though the case at hand is not without its difficulties, we nevertheless cannot escape the conclusion that in enacting section 2092, the Legislature meant just what it said, namely, that thereafter the judges of the county court in counties affected thereby should be paid a stated annual salary in lieu of all the other compensation theretofore allowed them, save for the per diem allowed them as members of the board of equalization and appeals. Certainly the language of the section itself is broad and comprehensive enought to lead at once to that interpretation; and we are further persuaded to that conclusion by reason of the fact that the Legislature specifically exempted the per diem allow-

ance payable by virtue of membership on the board of equalization, but made no exception in the case of excess fees earned by the board of plumbing inspectors and supervisors. Rather, it said that the salary fixed by the section should be in lieu of all other fees, compensation, or salaries, save as to the one exception expressly noted."

* * * * * * * * * * * * * * * * * * * *

"Conceding that in the enactment of the plumbing act, constituting the county court the board of plumbing inspectors and supervisors, the Legislature did impose new and additional duties upon the county judges for which they were entitled to be compensated, it does not follow that the Legislature was powerless to have fixed a maximum compensation for all duties of whatsoever character performed. In fact, section 2092 expressly recites that the salary fixed thereby shall be in lieu of the per diem theretofore allowed the judges 'as judges of the county court,' and also in lieu of all other fees, compensation, or salaries allowed them by law, including compensation for membership on the board of road overseers; the one exception noted being for membership on the board of equalization and appeals. Thus it appears that the Legislature in enacting section 2092 had the very thought in mind which appellants now advance, and that it framed the statute accordingly; nor is it amiss to call attention to the fact that this is not the only instance in the statutes where the Legislature has fixed a maximum salary for members of courts as compensation for all the duties, regular and additional, which have been imposed upon

> them by law. And the fact that the provision is made for the members of the board of examiners to be paid out of county funds if the proceeds derived from the operation of the act prove insufficient, in no wise militates against our conclusion."

We think the following words "said salary to be in lieu of other salaries, fees and commissions" is not unambiguous and clearly prohibits the county court from retaining any fee he formerly was entitled to receive by virtue of his office. This view is further supported by the 57th General Assembly enacting in this same bill Section 4, which provides what disposition shall be made with any and all fees received by said officers, and reads as follows:

> "In all counties to which this Act shall apply every official mentioned in this article shall, at the end of each month, or on or before the 15th day of the succeeding month, make out an itemized and accurate list, verified by his oath, of all fees or commissions due to his office, which have been collected by him or her, giving the name of the person or persons paying the same, and for what service rendered, and shall file one copy of said list or report with the County Treasurer, and one with the County Auditor, and shall pay over to the County Treasurer all moneys collected by him or her and covered by said report, taking two receipts therefor, one of which shall be immediately filed with the County Auditor."

Furthermore, Section 7 of the same act specifically prohibits any officer mentioned in Section 1 from receiving any compensation or retaining any fees, compensation or emoluments from any provision of law otherwise than in this act provided, and reads as follows:

> "Any official mentioned aforesaid, of any county aforesaid, who shall fail or neglect to comply with any provision of this article, shall forfeit his salary for that quarter of the year and be deemed guilty of a misdemeanor, and shall, upon conviction, be fined in a sum not less than fifty dollars nor more than five hundred dollars for each offense, and if he shall continue in default for three months, his office shall be deemed vacant, and shall be filled as provided by law for filling vacancies therein."

Even had this act not so provided that said officers shall pay over said fees to the County Treasury since they do not belong to said officers, they must belong to the county, and would be payable to the county by those in whose hands they are as in the case of other persons charged with county funds.

In the case of Johnson, Clerk of Board v. Deuser, County Treasurer, et al. 56 S. W. (2d), l. c. 806, the court said:

> "Concededly, there has been no express legislation upon the subject. However, if such surplus fees do not belong to the members of the board itself, then they belong to the county, and therefore would be payable into the county treasury by those in whose hands they are, as in the case of other persons chargeable with county funds. The general statutes are broad enough to cover that contingency, and appellants do not contest the point if we are correct in holding that they themselves are not entitled to retain the surplus funds remaining."

CONCLUSION

Therefore, it is the opinion of this Department that Section 1, page 375, Laws of 1933, regulates and controls the salary that the county judges shall receive in counties of the size of Greene County; that such county judges shall each receive per annum a salary of $2700.00, and no more. All fees, commissions and compensations coming to the said court by reason of said office shall be turned over to the County Treasurer as provided by Section 4, page 376, Laws of 1933.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

ARH:RV

CRIMINAL LAW: Information under Section 4014 R. S. Missouri, 1929, should contain the term "malice aforethought" and if not a part of the information upon acquittal the county should pay the costs.

March 8, 1940

3-11

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. Robert K. Nutter.

Dear Sir:

In answer to your request, we are herein rendering an opinion on the following letter written to you by Melvin Englehart, Prosecuting Attorney, Madison County, Missouri:

> "Your letter dated December 28, 1939 in regard to payment of cost bill in the above styled action, has been referred to me by the Circuit Clerk of this County.
>
> "I note in the second paragraph of your letter you state, 'the information filed by the Prosecuting Attorney does not contain the words "of malice aforethought" and therefore does not meet the requirements of Section 4014 RSMO 1929. It is essential that the crime be charged as having been done "with malice aforethought" in order to be brought under Section 4014 RSMO 1929. (State vs. Baird, 271 Mo. 9; 195 SW 1010).'

"I would like to call your attention to the case of State vs. Coleman 284 SW 799, in which the Supreme Court of this State held that it was not necessary to use the words 'of malice aforethought' or 'with malice aforethought' to charge felonious assault under Section 4014 Supra. The court referred to a long line of cases of this State interpreting the section under which this information was filed, to-wit, 4014, and held the information to meet the requirements of the statute. You will note that this case is much later than the case of State vs. Baird which you quote as the source of your authority.

"I think that if you will further check the case of State vs. Coleman supra, you will find that it has never been overruled in Missouri, and is still law. Therefore, if the information in State vs. Coleman is law in Missouri, it is not necessary to use the words 'of malice aforethought' or 'with malice aforethought' to charge felonious assault under Section 4014 supra. The only possible punishment under Section 4014 is by punishment in the State penitentiary and therefore under Section 3828 RSMo 1929, this cost bill is chargeable to the State and not to Madison County. I am returning this cost bill to you and if you have any further discussion in regard to this matter, please feel free to write me at your convenience."

Section 4014 R. S. Missouri, 1929, reads as follows:

> "Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years."

It will be noticed in the above section that the term "on purpose and of malice aforethought" is included. It will also be noticed that the minimum punishment is solely two years in the state penitentiary.

Section 4015 R. S. Missouri, 1929, reads as follows:

> "Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars."

The distinction between Section 4014, supra, and Section 4015, supra, is the fact that Section 4015 does not in-

clude the words "on purpose and of malice aforethought" and the punishment in Section 4015 can be as low as a fine of one hundred dollars. Under Section 4014, supra, according to our previous opinions rendered to you, the state would be liable for the costs. Also, under Section 4015, supra, according to our previous opinions rendered to you, in case of an acquittal of the defendant, the county would be liable for the costs.

Section 4014, supra, has been termed the "bloody section" and since the instructions in a trial of the case under Section 4014, supra, cannot and should not contain terms not included in the information, the information should contain the term "with malice aforethought."

In the case of State v. Johnson, 33 SW (2d) 912, pars. 1,2, the court said:

> "The only definite error assigned was the giving of instruction No. 3, drawn under section 3262, R. S. 1919, which makes it a felony, punishable by not less than two years in the penitentiary, to shoot at or stab one with malice aforethought with a deadly weapon or other means likely to produce death or great bodily harm with intent to kill, etc. It is called the 'bloody section.' It is urged by the defendant that the evidence did not warrant an instruction under that section, and that the court should have given an instruction under section 3263, which does not contain the language 'with malice aforethought' nor 'with a deadly weapon,' and permit a jail sentence or a fine. The instruction as given told the jury, if they found the defendant guilty of intent to kill on purpose with malice aforethought, they should assess his punishment at not less than two years' imprisonment."

In the letter from Melvin Englehart, Prosecuting Attorney, Madison County, to you, he calls attention to the case of State v. Coleman, 284 SW 799, in that case the information did not contain the words "of malice aforethought" but did contain the words "on purpose." The court in the case did not specifically state that the information in the case met the requirements of the statute under Section 3262 R. S. Missouri, 1919, which is now Section 4014 R. S. Missouri, 1929, but mentioned also Section 3263 R. S. Missouri, 1919, which is now Section 4015 R. S. Missouri, 1929. The verdict in the case was the assessment of a punishment of two years in the penitentiary, which verdict would conform to the penalty either under Section 4014, supra, or 4015, supra. That case came to the Supreme Court on the record proper only and did not contain bill of exceptions to show the form of the instructions.

In the case of State v. Meinhardt, 82 SW (2d) 890, l.c. 893, the court said:

> "Appellant was charged, by the information, that he made an assault 'on purpose and of his malice aforethought to kill and murder.' The crime, as charged, is governed by section 4014, R. S. Mo. 1929 (Mo. St. Ann. sec. 4014, p. 2817). This section prescribes a minimum punishment of two years' imprisonment in the penitentiary. The succeeding section, that is, section 4015, R. S. Mo. 1929 (Mo. St. Ann. sec. 4015, p. 2821), provides that an assault with intent to kill or do great bodily harm, etc., shall be punished by imprisonment in the penitentiary and the punishment may be as low as a fine of $100. The two sections are very similar, except that under section 4014 'malice aforethought' is an essential element. The argument, therefore, that under the stat-

ute there are no such crimes as an assault without malice aforethought, is without merit. State v. Grant, 144 Mo. 56, 45 S. W. 1102; State v. Johnson, 318 Mo. 596, 300 S. W. 702, loc. cit. 704 (5-7)."

"* * * * * * * *
The gist of the crimes defined in sections 4014 and 4015 is assault. The one with malice aforethought, the other without such malice. Assaults, under section 4015, whether made with intent to kill or made to do great bodily harm stand on the same footing. The punishment prescribed is for the assault. The intent with which the assault is committed is immaterial so long as it is made with intent to do one or more of the acts mentioned in the section. Appellant, by the verdict of the jury, was found guilty of an assault upon N. R. White. This conviction can be successfully pleaded in bar in any prosecution for the same act. Under the charge of an assault to kill with malice aforethought, appellant could be properly convicted of an assault with intent to kill or do great bodily harm without malice, which is a lesser crime of the same nature. State v. Hubbs, 294 Mo. 224, 242 S. W. 675, loc. cit. 678 (10); State v. Johnson, supra. The trial court, by its instructions, submitted the case to the jury, authorizing them to convict appellant under either section 4014 or 4015, supra. The verdict in this case is in compliance with section 3701, R. S. Mo. 1929 (Mo. St. Ann. sec. 3701, p. 3257),

> which requires that in cases where a jury finds a defendant guilty of a lesser offense than charged in the information or indictment the verdict shall specify of what degree of the offense they find him guilty. The verdict in this case clearly indicates that the jury found appellant guilty under section 4015, that is, an assault without malice. * * * "

It will be noticed in the holding in the above case that the court specifically stated that the two sections are very similar, except that under Section 4014 "malice aforethought" is an essential element.

In the case of State v. Johnson, 300 S. W. 702, l.c. 704, the court said:

> "The pleader attempted to charge an offense under section 3262, R. S. 1919. While rather awkwardly drawn and not to be commended as an example of good pleading, we think the information sufficiently charged all the elements of the offense under section 3262. It charged that the assault was on purpose and of appellant's malice aforethought and by a means likely to produce death or great bodily harm, 'with his hands, fists and feet, with great force and violence.' That the assault was made 'with intent to kill' is very unartfully charged. It had previously been alleged that the assault was made on purpose and with malice aforethought. Later it was alleged that the assault was 'on purpose and of his malice aforethough(t) to kill and murder.' An allegation that an assault was made on purpose and with malice aforethought to kill

> sufficiently alleges that the assault was made with intent to kill. This was at most a defective allegation, which did not tend to prejudice the substantial right of appellant upon the merits, and the information was good after verdict, under the saving grace of section 3908, R. S. 1919.
>
> "As the information sufficiently charged an assault with intent to kill under section 3262, the trial court was authorized, if the evidence warranted it, in giving an instruction under section 3263, which defines the crime of assault with intent to kill or do great bodily harm. Section 3692, R. S. 1919. Section 3263 does not involve the elements of malice aforethought or the use of a deadly weapon or by means or force likely to produce death or great bodily harm.
>
> "The court did not instruct under section 3262, but gave instructions upon felonious assault with intent to do great bodily harm, under section 3263, and upon common assault.
> * * * "

It will be noticed in the opinion in the above case that the court specifically stated Section 3263 does not involve the elements of malice aforethought or the use of a deadly weapon, or by means or force likely to produce death or great bodily harm. Section 3262 and Section 3263 R. S. Missouri, 1919, set out in the above opinion are now Sections 4014 and 4015 R. S. Missouri, 1929.

CONCLUSION

In view of the above authorities, it is the opinion

of this department that the information under Section 4014 R. S. Missouri, 1929, should contain the words "on purpose and of malice aforethought" and that upon an acquittal under an information which does not contain that term the county is liable for the costs and not the state. The reason being that under Section 4014 R. S. Missouri, 1929, the punishment is a punishment solely in the penitentiary, while under Section 4015, supra, the punishment may be as low as $100.00.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

PENSIONS:
OLD AGE
ASSISTANCE:

Under Section 16, Page 736, Laws of 1939, the State Social Security Commission is unauthorized to suspend monthly payments pending appeal for a hearing.

March 15, 1940

3-16

FILED
83

Honorable W. Randall Smart
Member
Missouri House of Representatives
Commerce Building
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of February 19, 1940, which reads as follows:

"I would appreciate if you would furnish to me your opinion of the law on the following facts:

'An aged recipient under our Social Security Laws is denied further benefits. Within the proper time he files his application for a hearing before the State Board, under Section 16 of the Revised Social Security Act, page 736, Session Acts of 1939. The petitioner or Appellant makes demand upon the State Social Security Commission that it continue to pay the appellant and retain him on the rolls until the case has been determined by the State Social Security Commission. The Commission has refused to pay appellant, but state that the

> recipient's name shall be carried on the payroll in a suspended form and if the Commission finds the appellant eligible, reinstatement shall be made as of the date case was closed, and he would automatically receive all of his back payments.'
>
> "Will you please advise if this act on the part of the State Social Security Commission is not a direct violation of the law, the intent and purpose of the law, and that the Commission should be required to continue payments to the recipient until a final determination by the Commission."

You enclose a letter addressed to you under date of February 17th, from Mr. William Huttig, Secretary-Administrator of the State Social Security Commission of Missouri, which reads, in part:

> "Upon receipt in the State office of Forms PA-2 (Appeal forms) from a former recipient to request a hearing before the State Commission, the closing shall be cancelled by the State Office and the recipient's name carried on the payroll in a suspended form. If the State Commission finds the appellant to be eligible, reinstatement shall be made as of the date case was closed and in the amount received at the time of closing."

Section 16, as amended by the Sixtieth General Assembly, page 737, Laws of 1939, reads as follows:

"If an application is not acted upon within a reasonable time after the filing of the application or is denied in whole, or in part, or if any benefits are cancelled or modified under the provisions of this Act, the applicant for pensions, or old age assistance, or aid to dependent children, shall be notified at once and may appeal to the State Commission, said appeal from the State Administrator to the State Commission shall be filed in the office of the secretary of the county commission by the aggrieved applicant within ninety days from the date of the action and decision appealed from. Proper blank form for appeal to the State Commission shall, upon request, be furnished by the county office to any aggrieved applicant and every such appeal to the State Commission shall be certified and transmitted by the county office to the State Commission within ten days after same is filed with the county office. The State Commission shall upon receipt of such an appeal give the applicant reasonable notice of, and opportunity for, a fair and speedy hearing in the county of the residence of the applicant. Every applicant on appeal to the State Commission shall be entitled to be present, in person and by attorney, at the hearing, and shall be entitled to introduce into the record at said hearing any and all evidence, by witnesses or otherwise, pertinent to such applicant's eligibility as defined under the provision of Sections 11 and 12 of this act and all such evidence shall be taken down, preserved and shall become a part of the applicant's record in said case, and upon the record so made the State Commission shall determine all questions presented by the appeal. Any

applicant aggrieved by the action of the State Commission by the denial of benefits in passing upon the appeal to the State Commission may appeal to the circuit court of the county in which such applicant resides within ninety days from the date of the action and decision appealed from. The State Commission, upon a denial of benefits to the applicant, shall, upon request, furnish said applicant with proper form of affidavit for appeal from the said Commission to the circuit court of the county in which the applicant resides. Upon the affidavit for appeal, duly executed by the applicant before an officer authorized to administer oaths, being filed with the State Commission within ninety days from the date of the said Commission's decision denying benefits to said applicant, the entire record preserved in the case at the time of the applicant's hearing, together with the affidavit for appeal, shall, by the State Commission, be certified to the circuit court of the county in which the applicant resides and said case shall be docketed as other civil cases except that neither party shall be required to give bond or deposit any money for docket fee on appeal to the Circuit Court. Such appeal shall be tried in the circuit court upon the record of the proceedings had before and certified by the State Commission, which shall in such case be certified and included in the return of the State Commission to the court. Upon the record so certified by the State Commission, the circuit court shall determine whether or not a fair hearing has been granted the individual. If the court shall decide for any reason that a fair hearing and determination of the applicant's eligibility and rights under this act was not granted the individual by the State Commission, or that its decision was arbitrary and unreasonable, the court shall, in such event, remand

> the proceedings for redetermination of the issues by the State Commission. Appeals may be had by either party from the Circuit Court upon the record in the same manner as provided herein for appeals from the State Commission to the Circuit Court and all appeals to the Circuit and Appellate Courts shall be advanced on the docket of said Courts for immediate hearing and determination. In no event when appeal is taken shall any person's name be removed from the rolls of public assistance under this act, until the case has been heard and determined by the State Social Security Commission. The file and record of every person whose name is duly entered upon the public assistance rolls of this state, at all reasonable times, be open to inspection by such individual and to any representative of such individual."

The pertinent part of Section 16 to be construed is:

> "* * * In no event when appeal is taken shall any person's name be removed from the rolls of public assistance under this act, until the case has been heard or determined by the State Social Security Commission. * * * "

We are unable to find any decisions construing this specific provision.

In re Costello's Estate, 92 S. W. (2d) 723, l. c. 725, 338 Mo. 673, the court said:

> "This statement is in harmony with the rule, in all jurisdictions, which follows:

> 'As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the intention or purpose of the legislature as expressed in the statute.' 59 C. J., p. 948."
> (See also Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452.)

Under Section 16, page 475, Laws of 1937, which was effective prior to the Sixtieth General Assembly repealing same and enacting in lieu thereof Section 16, p. 737, Laws of 1939, the appellate courts in this State held that the Circuit Courts were not exceeding their jurisdiction in restoring claimants to the roll as of the date they were arbitrarily removed with back pay to date of trial in the Circuit Court.

In State v. Hughes, 128 S. W. (2d) 671, l. c. 673, the court said:

> "We also think and hold that the trial court was within its jurisdiction in holding as of the date of the trial October 20, 1938, that the applicant 'is entitled to all the assistance which she was drawing at the time of being stricken from the rolls.'"

Also, in Galvin v. State Social Security Commission, 129 S. W. (2d) 1051, l. c. 1053, the court said:

> "We conclude that when the court adjudged that respondent be restored to the roll the law wrote into the judgment that such restoration was of the date of the erroneous removal and that the words in the judgment 'as of November 30, 1937', were unnecessary and added nothing to the force of the judgment."

Under Section 16, Laws of 1939, page 736, the Circuit Court has been restricted so that now all the jurisdiction the circuit court has on one of these appeals is to determine if the claimant received a fair hearing and whether or not the Commission was unreasonable or arbitrary in rendering their decision and all the jurisdiction the circuit court has under this provision, if they find against the Commission on any of these points, is to remand same to the Commission for a redetermination, which is quite a contrast to Section 16, Laws of 1937, as hereinabove construed by the appellate courts in this State.

It is common knowledge that the Sixtieth General Assembly was faced with the possibility of losing Federal participation in paying old age assistance in this State, if the State Act was not amended so as to comply with the requirements of the Federal Social Security Board and the provisions of its Federal Appropriation Act. One of the principal complaints leveled at the State Social Security Board by the Federal Board was that the said act was not being administered by a single state agency as provided by the State Act, State plan approved by the Federal Board and the Federal Act. Another complaint was that the circuit courts in this state were restoring to the rolls persons who had been declared by the State Social Security Commission (the single state agency) ineligible. Another complaint was that the appeal provided for a trial de novo which permitted the admittance of new evidence, evidence that the Commission had never had before it. Such evidence might even show a change in conditions from the conditions at the time recipient was removed or at the time of hearing.

The Federal Social Security Board heretofore has never participated in this state in retroactive payments, and we assume they will not participate in suspended payments. There is no reason for enacting such a provision if it is to be construed as meaning the Commission shall leave the recipient's name on the roll without any payments, pending the final decision of the Commission which must come after a hearing has been held. If this was the intent of the Legislature, they would have been more specific and included such a provision.

It is fine to say if the Commission finds for the claimant then the back payments shall be forthcoming to the claimant. But what about his expenses pending the hearing? How is he to meet these expenses? This might be defeated by the expiration of an appropriation for that biennium and the new appropriation might specifically prohibit any such payments. In other words, what reason is there for leaving his name on the roll and suspending payment? The lawmakers could have had but one thought in enacting such a provision and that was that the recipient should continue to draw his monthly assistance until the State Social Security Commission finally determined his appeal.

The State Social Security Commission may make rules and regulations under the State Social Security Act, but this does not permit them to legislate and enact laws. The rules and regulations may be promulgated only for the purpose of administering the act.

Volume 12 C. J., page 847, Section 330, reads as follows:

> "While the power to make laws may not be delegated to a board or commission, nor may the legislature, without prescribing any standard of exemption, leave it wholly to the discretion of a commissioner to exempt persons from the operation of a statute, yet, a certain policy or rule having been prescribed by

> statute, matters of detail in carrying out the executive duty of giving effect to the legislative will may be left to boards or commissioners. The interstate commerce commission is a conspicuous illustration of this rule."

In Field v. Clark, 12 S. Ct. Rep. 495, l. c. 505, the court said:

> "'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

One of the cardinal rules of statutory construction is to favor a reasonable construction which would tend to avoid injustice and oppression. In State v. Irvine, 72 S. W. (2d) 96, l. c. 100, 335 Mo. 261, 93 A L. R 232, the court said:

> "The Courts will not construe a statute as to make it require an impossiblity."

In State ex rel. St. Louis Public Service Co. v. Public Service Commission, 34 S. W. (2d) 486, l. c. 489, 326 Mo. 1169, the court said:

"A statute should not be construed in a way to make it unreasonable when it can be given a reasonable construction."

It has already been shown that under Section 16 prior to it being amended by the Sixtieth General Assembly, the Circuit Courts were restoring persons to the roll as of the date they were removed when found by the circuit court on appeal to be eligible. The amendment prohibits such jurisdiction. Therefore, is it not reasonable to believe that the Legislature was of the opinion the recipients should be guaranteed their monthly assistance until the Commission after a hearing finally determined their eligibility. The very words import no other meaning. So long as a person's name is on that roll he is entitled to some assistance. This provision was enacted in order to stay the Commission from removing a recipient until the State Social Security Commission itself finally passed upon their eligibility. Another reason for this construction is that heretofore under the former act before same was amended, and probably not so much now, in many cases it would be a year or more after the recipient was removed from the roll and filed his appeal to the Commission for a hearing before the Commission would grant him a hearing and finally pass on said hearing. There was no delay in the circuit court after the recipient filed his appeal to the circuit court, but a prerequisite for appeal to the courts was the hearing and decision of the Commission.

After the appeal for hearing was filed, the Commission would require what they termed a reconsideration which caused much delay and required the presence of the District Supervisor and worker with the recipient. This was necessary before the hearing could be held. There was no specific provision under the law for holding such a reconsideration. Of course, now under the amendment it almost prohibits a reconsideration for the reason it specifically requires the County Social Security Commission to forward said appeal to the

State Social Security Commission within ten (10) days after receipt of same. However, there is no provision requiring the Commission to hold hearings within any specific time after receipt of said appeal.

As we read this amendment we can see no sound or logical reason why the Sixtieth General Assembly in enacting such amendment would ever do so with the intent that the name should remain on the roll with no monthly payments until the State Social Security Commission had finally rendered its decision after a hearing. Then, if they found for the claimant he shall receive back payments and if they found against him he receives no back payments and his name is then removed from the roll. The Legislature very well knew that only a very small percentage after a hearing are ever restored to the roll voluntarily by the State Social Security Commission.

CONCLUSION.

Therefore, we are of the opinion the Sixtieth General Assembly in amending Section 16, supra, fully intended that all recipients for old age assistance that were ordered stricken from the roll should remain on the roll and continue to receive old age assistance until a hearing was granted and the Commission finally determine their eligibility. This is the only reasonable construction for such a provision.

This amendment further requires a person desiring to appeal to the Commission for a hearing to do so within ninety (90) days after he is notified that he will no longer receive assistance. If he fails to

file his appeal within the specified time and comply with the law, then he may be removed from the rolls upon the expiration of this special period.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

ARH/rv

STATE AUDITOR:) Under Section 2917, R. S. 1929, the State Auditor
SCHOOLS:) is compelled to certify the amount of tax needed
) for the payment of coupons, but it is not his
) duty to make the levy; such duty falls on the
) school board.

April 3, 1940

H-9

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department is in receipt of your letter of March 25th, wherein you make the following inquiry:

"Acting in my capacity as State Auditor, I wish to submit to you, for your opinion, a question which has arisen concerning the powers and duties of this office in connection with the levying of taxes required to pay principal and interest of school bonds duly issued by a school district in the State, payment of said principal and interest being now in default.

"The facts as I understand them are as follows:

"A school district in St. Louis County had outstanding five bond issues, aggregating $67,000 principal amount. A part of the district had almost entirely a white population, and another part of the district had a colored population. By action duly taken the school district was divided and two new school districts were created out of the territory of the original district. One of said new districts, embracing the white population, can be designated as the

B School District, and the other new district, embracing the colored population, can be designated as the K School District. Both districts are city or town school districts, each district having six directors.

"At the time of the division of the original school district and the formation of the two districts, it was agreed that sixty per cent of the bonded indebtedness of the district should be assumed by the new B School District and that forty per cent of such outstanding indebtedness should be assumed by the new K School District.

"The B. School District has refused to pay its sixty per cent of the outstanding bonded indebtedness now due, contending that the K School District has collected and appropriated certain funds (approximately $8,000 to $10,000) which should be paid into the sinking fund of the B. School District. The K School District refuses to make such payment but expresses its willingness to abide by its agreement to assume and pay forty per cent of the bonded indebtedness of the original school district. As said above, a portion of the principal of said indebtedness is now past due and a substantial amount of interest has also accrued on the bonds of the original district.

"Certain bondholders owning bonds of the original school district have requested this office to act pursuant to the provisions of Section 2917, R. S. Mo. 1929, and to

certify to the two School Districts which include the territory formerly embraced in the original school district, the amount required to pay all sums in arrears, both principal and interest, and in the event that taxes are not duly levied and collected to pay such amount, that this office levy a special tax on all of the property situated in the original school district for the purpose of paying the principal and interest in arrears.

"The foregoing precedure was sustained by the Supreme Court in the case of State ex rel. Henry v. State Auditor and Forrest Smith as such State Auditor, 342 Mo. 797, 118 S. W. (2d) 19. The statute under consideration in said case was Section 8182, R. S. Mo. 1929, applicable to certain special road districts.

"Section 2917, R. S. Mo. 1929, contains provisions very similar to those contained in Section 8182, considered by the Supreme Court in the foregoing case, and I desire to know whether or not, in your opinion, I have the power and duty to proceed with the levy of taxes as aforesaid:"

Discussing for the moment the question of the B School District, which you have designated as the district whose students are white, and the K School District whose students are colored, and the agreement between the two school districts, we think that question involved is purely collateral and has no bearing on any ultimate duty which you have to or have not to perform.

We assume that the original bond issue encumbered the entire district before it was divided. The two districts were probably under the provisions of Section 9275,

R. S. Mo. 1929. Section 9278, R. S. Mo. 1929, provides for the distribution of the property and Section 9279, R. S. Mo. 1929, provides for the valuation of the property to be divided when the districts cannot agree upon a settlement. Regardless of the division of the indebtedness between the two districts, which you state to be of ratio of 40 and 60, the terms of the bond will determine and in all probability make either or both districts liable for the entire amount. However, the agreement between the two districts can be enforced as between themselves.

We have considered the statutes and the decision which is contained in your letter. It will be necessary to set forth the statutes involved in order that we may determine whether the decision is applicable.

Section 8182, R. S. Mo. 1929, which refers to "special road districts" in certain counties, is as follows:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk,

> in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. Whenever it shall be made to appear to the state auditor that the board of commissioners has failed or neglected to comply with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May, to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued."

In the decision of State ex rel. Henry v. State Auditor, 342 Mo. 797, said decision pertaining to a mandamus action against you as State Auditor, the court held in substance that the part of Section 8182 requiring the State Auditor when the board of commissioners of a road district has not complied with the provisions of the statute for levying taxes to pay interest on bonds issued, to perform such duties, is directory, and that six months delay would not prevent the power to levy the tax. The element of time was your main defense and the court overruled your contention and awarded the peremptory writ compelling you to make the levy.

Section 2917, R. S. Mo. 1929, is as follows:

> "The state auditor shall, annually, on or about the first day of July, certify to the several county courts, city councils, boards of aldermen, boards of trustees, school boards, boards of supervisors or boards of commissioners, the amount required

> during the next fiscal year to pay maturing interest coupons, together with ordinary costs to the state of collection and disbursement of the same, which amount shall thereupon be levied as a special tax upon all property in such county, city, village, township, school district, special or common road district, drainage district or levee district, and shall be collected with the state revenue and paid over to the treasurer of the county, city, village, township, school district, drainage district or levee district, special or common road district, having issued such outstanding registered bonds, which shall be deposited by such treasurer to the credit of his respective county, city, village, township, school district, drainage district, special or common road district, or levee district, in the bank or banks at which the same are made payable; provided, that this special tax may be paid in coupons, registered under this article, overdue or maturing during the current fiscal year."

We have compared the two sections and detect very little similarity. Under Section 8182 the express provision is that, "Whenever it shall be made to appear to the state auditor that the board of commissioners has failed or neglected to comply with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May, to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued." Thus, as was held in the case of State ex rel. Henry v. Smith, State Auditor, supra, there

is placed upon you a mandatory duty if the board of commissioners of a district does not perform its duty within the required time. Section 2917 imposes no mandatory duty upon you in so far as imposing a levy for the collection of principal and sinking fund on bonds. It does require you on or about the first day of July to certify to the school boards in question "the amount required during the next fiscal year to pay maturing interest coupons, together with ordinary costs to the state of collection and disbursement of the same." We interpret the next portion of the section, namely, "which amount shall thereupon be levied as a special tax upon all property in such county, city, village, township, school district * * * and shall be collected with the state revenue and paid over to the treasurer of the county, city, village, township, school district * * * having issued such outstanding registered bonds, which shall be deposited by such treasurer to the credit of his respective county, city, village, township, school district * * *" to be a duty imposed upon the school board.

As we interpret the statute, and we think it is plain and unambiguous, you must carry out your duty as contained in the first provisions of the statute, but the burden of levying the special tax upon the property and the collection of the tax falls upon the school districts, and if you have certified the amount required during the next fiscal year to pay the interest coupons then you have discharged your full duty under the statute and any contemplated mandamus action should be brought against the school districts and not you as State Auditor. We accordingly so hold.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

TAXATION:
SALES TAX:
RURAL ELECTRIFICATION
ASSOCIATIONS:

Rural Electrification Associations which purchase current at wholesale should collect the sales tax from their members or consumers to whom they sell current.

April 15, 1940

H-18

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. John H. Hendren

Dear Sir:

This is in reply to yours of recent date wherein you call our attention to an opinion of this department dated September 10, 1937, written to Honorable Gray Snyder, Attorney at Law, Palmyra, Missouri, in which opinion we held that the City of Palmyra should collect the 2% sales tax on electric current and energy that it sells to the said Missouri Rural Electrification Co-Operative Association and that said Association is the user and consumer of such current and energy and is liable for the payment of the tax.

In your statement you call our attention to the recent ruling of the Supreme Court of Missouri in the case of Berry-Kofron Dental Laboratory v. Forrest Smith, et al., decided at the January Term, 1940, which is not yet reported. On the question of use and consumption, the court in that case said:

> "* * * The tax is imposed only upon sales 'for use or consumption and not for resale in any form as tangible personal property.' By statute, Sec. 655, R. S. 1929, Mo. St. Ann. Section 655, p. 4899, words and phrases are to be taken in their ordinary and usual sense, except that 'technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.' We have said, 'One of the cardinal rules of statutory interpretation and construction

is that words in common use are to be construed in their natural, plain, and ordinary signification and acceptation.' Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 989, 13 S. W. 2d 628, 638 (14). The words 'use' and 'consumption' are not technical words having a peculiar meaning in law but words in common use and as employed in the statute must be given their plain, ordinary meaning.

"Webster's New International Dictionary, 2nd Ed., defines the noun 'use' as 'Act of employing anything, or state of being employed; application; employment, as the use of a pen; his machines are in use;' 'The fact of being used or employed habitually; usage, as, the wear and tear resulting from ordinary use.' Other suggestive definitions do not seem here appropriate. Consumption is defined as 'Act or process of consuming; waste; decay, destruction; also the using up of anything, as food, heat or time.' 'Consume' is defined as meaning to destroy the substance of--to use up, expend, waste,--to eat or drink up (food). Defining the word 'use' as employed in a statute imposing a retailers' occupation tax the Illinois Supreme Court said in Revzan v. Nudelman, 370 Ill. 180, 185, 18 N. E. 2d 219, 222, 'As employed in the statute here under consideration "use" means a long-continued possession and employment of a thing to the purpose for which it is adapted, as distinguished from a possession * * * that is merely temporary or occasional. The user or consumer contemplated by the statute is the ultimate user or consumer who will use the articles as long as they last or until he desires to do away with them.'"

The Missouri Sales Tax Act, which was reenacted in 1939, Laws of Missouri 1939, page 859, subsection (g) defines the term "sale at retail" as follows:

> "(g) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this Act and the tax imposed thereby, it shall be construed to embrace:
> * * * * * * * "

This is the same definition of the foregoing term as was contained in the 1935 and 1937 Sales Tax Act.

The word "business" is defined at page 858, subsection (c) as follows:

> "'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. * * * * "

This is the same definition of the word "business" as contained in the 1935 and 1937 Sales Tax Act.

It will be noted that if the Rural Electrification Association engages in an activity with the object of gain, benefit or advantage to its members then under the Sales Tax Act it would seem the Act would include its transactions within its provisions providing it makes sales to the user or consumer of electrical current. It will be noted that under the definition of

the term "sale at retail" it was intended to apply to that transaction whereby the property is sold for final use or consumption and not for resale in any form as tangible personal property.

When the foregoing opinion was rendered, the State Auditor, by virtue of the Sales Tax Act, had promulgated Rule Number 38, which was to the effect that where a club, such as a country club and similar organizations, were not open to the general public, are deemed to be the users and consumers of the goods which they purchase and resell to their members and that sellers of such supplies to such clubs should collect and remit the tax thereon. The conclusion arrived at in the foregoing opinion was based on the theory that the Rural Electrification Association and its set-up was analogous to that of a club and, therefore, the person or firm which sold electrical current to the Rural Electrification Association to be distributed should collect the tax on that transaction.

Again referring to the definition of the term "business" and applying this definition for the purpose for which the Rural Electrification Associations are formed, it would seem that these associations are formed for a different purpose than that of an ordinary club in that they are formed for the purpose of gain, benefit and advantage.

And referring to the definition of the term "sale at retail" it would seem that the individual member of the association, in view of the ruling in the Berry-Kofron Dental Laboratory v. Smith et al., supra, would be classed as the ultimate consumer more appropriately than would the association itself.

In 1939 the General Assembly of this State, by House Bill 567, Laws of Missouri 1939, page 298, enacted legislation pertaining to the Rural Electrification Associations which authorized these associations to incorporate and do business very much in the same manner as other corporations do in this state. Their

activities, however, were limited to the sale and distribution of electrical current. From a reading of this act it will be seen that the lawmakers did not consider these organizations as clubs in the ordinary term as we refer to clubs but they considered them as a businss corporation operating for gain, benefit or advantage.

Under our general law it cannot be successfully contended that a person who makes a purchase from a corporation of which he is a member would be exempt from paying sales tax on articles which he purchased for use and consumption. So applying the same rule the fact that a person is a member of the Rural Electrification Association, if he is the user and consumer of the current which he purchases and the electrical association is in the business for gain, benefit or advantage, then that transaction would be the taxable transaction under the Sales Tax Act.

We have made a diligent search of the reports of the various states for a case which is similar to the question here submitted and we think that the Supreme Court in the State of Washington in the case of Peninsula Light Co. v. Tax Commission of Washington, 56 P. (2d) 720, passed on a question similar to the one here under consideration. In that case the Peninsula Light Company purchased electrical power for wholesale from Tacoma and resold it to constituent members at retail. This is very similar to the transaction which takes place between the City of Palmyra and the Rural Electrification Association which was referred to in the foregoing opinion. In the Peninsula Light Company case, supra, the court said:

> "* * * This is certainly an activity which is engaged in with the object of gain, benefit, or advantage, either direct or indirect, under the provisions of section 1 (7), supra."

The term "business", as defined under the Washington Act, is almost identical with the definition in the Missouri Act.

The Power Company in the Washington case purchased power at wholesale and distributed it to its members without profit over lines built by the members at a cost sufficient only to defray the cost of the distribution. Under the Missouri set-up the Rural Electrification Corporations purchase power at wholesale and distribute the same to their members and others over lines built by the corporation at a cost sufficient to defray the expense of distribution and to pay the operating expenses and to pay for the distribution system within a certain period of time. So it will be seen that the mode of operation of these two companies is quite similar in so far as they may be classed as doing business, that is, both of these companies would seem to be engaged in a commercial business and activity for gain, benefit or advantage as is defined in the two acts. While in the Peninsula Light Company Case the question as to where the retail sale took place was not directly before the court, yet as stated by the court in that case, l. c. 721, and as stated above herein:

> "* * * This company buys electric power wholesale from Tacoma and resells it to its constituent members at retail. * * * * * * * * * "

which in effect is to say that the sale at retail of this current takes place when the Peninsula Light Company sells the current to its members who, under the Missouri Act and the ruling announced in the Berry-Kofron Dental Laboratory Case, supra, would be considered the user and consumer.

CONCLUSION.

From the foregoing it is the opinion of this department that when a Rural Electrification Co-operative Association purchases electrical current at wholesale and sells it to its various members and other parties to whom it is authorized to sell such current that such members and said other parties under the Missouri Sales Tax Act would be considered the users and consumers of

the same and that the sale at retail of such current occurs when the said electrical association sells the current and energy to its members and others to whom it is authorized to sell the same. Therefore, the transaction upon which the sales tax should be imposed is the one in which the Rural Electrification Co-operative Association sells current to its members or others to whom it is authorized to sell the same.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

COUNTY BUDGET ACT: Balance for printing financial statement and not budgeted can only be paid out of surplus or transferred from other classes. Amended Act of 1939, page 656, does not change the liability of the county clerk as budget officer on his bond. Also the same liability on the county clerks of counties of population over 50,000, under Section 20, Laws of 1933, page 340 et seq.

April 30, 1940

B3

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

On March 28th you wrote this Department and submitted a number of questions. The first part of your inquiry relates to a letter which you have received concerning the payment under the Budget Act for the publishing of the financial statement, and is as follows:

> "'The County Court and myself are having some trouble about paying for the publishing of the Financial Statement, the Courts budget for same was $450.00 and the cost for publishing was $693.00, and I have refused to write a warrant for only the $450.00 which was all the Budget called for. Now please inform me how they can pay the balance of $243.00. There will not be enough in Class Five to pay this at the close of the year, I want to stay on the safe side, but I want to do what is right.'"

The rulings of this Department have been to the effect that no warrant should be issued for items which are in excess of the amount budgeted under any of the five classes. The main objective of the Budget Act was to compel counties to maintain their expenses within the anticipated revenue. In counties of less than 50,000 inhabitants

there are five classes which the act compels all officers participating in the issuance of any warrant to sacredly preserve the priorities. The only manner by which the county official, referred to in the letter, can properly protect himself is the course which he has pursued, that is, honor a warrant for the amount which was contained in the budget. We have held that any surplus in any of the preceding classes may be transferred to Class 5, provided it does not in anywise jeopardize the items contained in any of the classes.

Another method by which payment might be made is, if there is at the close of the fiscal year any surplus funds from any of the classes such surplus may be used. If there does not remain any surplus at the close of the year it will be necessary to take this item into account for the ensuing year.

I

Part I of your request is as follows:

"Does the 1939 revision which makes the county clerk ex-officio 'Budget Officer,' place liability on his official bond for issuing warrants in excess of the approved estimates certified to the county treasurer and the State Auditor, in counties of less than 50,000 population?

"Is such liability established in counties of 50,000 but not in excess of 80,000 population?

"Apparently by provision of Sections 12161, R. S. Mo., 1929, and Section 21, of the 1939 Revision, the county clerk is ex-officio 'Accounting Officer' in all counties not having elected auditors or comptrollers. If liability is to be established,

> under which of the various functions performed by the clerk is it to be charged? Please give your opinion on the above questions confining it generally to excess issuance of warrants over appropriations for classes or funds."

The County Budget Act was originally passed in 1933, Laws of Missouri, 1933, page 343 et seq. There was a minor amendment made in 1937, Laws of Missouri, 1937, page 422, with reference to transferring funds in Class 5. In 1939, Laws of Missouri, 1939, page 656, the Legislature repealed Sections 1, 9 and 21, and enacted new sections in lieu thereof. The only marked difference in the new section (Section 1) is the sentence, "The clerk of the county court of the several counties of this state shall be the budget officer of such county and as such shall prepare all data, estimates and other information * * *," whereas, formerly it was the duty of the clerk of the county court to prepare such data, estimates etc., without designating such officer as the budget officer of the county. And likewise, the present section (Section 1) states that Sections 1 to 8, inclusive, of the original act shall govern counties of 50,000 inhabitants or less.

Therefore, it is our conclusion that no change has been made in the liability of an officer participating or actually issuing warrants contrary to the Budget Act in counties of less than 50,000 population.

The question as to whether or not the budget officer comes within the provisions of the penalty section, which is the last paragraph of Section 8, Laws of Missouri, 1933, page 346, will next be discussed. Said paragraph is as follows:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer,

> participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

Bearing in mind that the original act in counties of less than 50,000 contained no reference to a budget officer, and the penalty section states, "any county clerk," does the budget officer now come within the provisions of the penalty section? The new section (Section 1) states that the clerk of the county court shall be the budget officer, thereby making in effect the county clerk and the budget officer synonymous. By Section 4, Laws of Missouri, 1933, page 343, it has always been the duty of the county clerk to prepare certain data and in reality function as the budget officer. In our opinion the Legislature has simply conferred title and in another section given additional compensation to the county clerk for preparing data which he formerly prepared without compensation. But, we do not have to rely on the statement in the penalty paragraph of Section 8 to bring the budget officer within the purview of the section, as Section 8 states, "or other officer." This, in our opinion, is broad enough to include the county clerk, now designated as budget officer, and we accordingly hold that the county clerk as such budget officer is subject to the same penalty and liability as any other officer enumerated or mentioned in the penalty section.

We further hold that the county clerk as budget officer is not subject to the same penalties and liabilities under his official bond in counties of 50,000 but not in excess of 80,000 population. Such liability, if it exists, must be found in sections 9 to 21, inclusive, of the original act of 1933, and its amendments, if any, referring to him in the Laws of 1939, pages 656 to 658, inclusive.

We next refer to that portion of your letter which relates to Section 12161, R. S. Mo. 1929, and Section 21, Laws of Missouri, 1939, page 658, and you desire to know which section governs the liability of the county clerk.

Section 20, Laws of Missouri, 1933, page 351, refers to the liability of certain officers, especially to the accounting officers, and contains reference to "any officer" and "such other officers." Section 22, Laws of Missouri, 1933, page 351, states, "All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed."

From a cursory examination of the duties of the county clerk under the Budget Act, and under Section 12161, supra, which has been on our statute books many years, we fail to discern any conflict between the statutes with reference to the duties of the county clerk. In other words, it appears that he can carry out his duties under Section 12161 and his duties under the Budget Act. However, if a conflict arises or if liability for wrongful acts under the official bond or otherwise on the county clerk comes into question, we are of the opinion that his duties and liability as established under the Budget Act shall control, by virtue of the fact that Section 22, supra, repeals all conflicting laws, and being a later law naturally predominates and takes precedence over all other laws.

Therefore, in answer to your request that we give particular emphasis to the point of issuing excess warrants over the amount budgeted, we think the county clerk as accounting officer, or any other officer defined as "the accounting officer," is liable under Section 20, Laws of Missouri, 1933, page 351, for warrants drawn in excess of the amount appropriated.

II

Part II of your request is as follows:

> "Sections 7 and 11, Laws of 1933, Page 345 -7, provides that each officer or department furnish an estimate which the county court or

or budget office as the case may be, shall examine administratively as provided by the Act. Section 20, provides that an officer is individually liable on his bond for purchases made without authorization of the "Accounting Officer."

"Do the various revisions place liability on the county clerk and his bondsmen for warrants issued covering purchases made in excess of the budget estimates of any official or department?

"Please give your opinion confining it generally to excess issuance of warrants over appropriations allotted by separate office or departments within the total appropriation by classes or funds. Please point out application as it affects counties of less than 50,000 population, over 50,000 but not in excess of 80,000, and showing against which of the various functions performed by the county clerk the liability, if existing, would be charged."

As we have heretofore pointed out in answering your other questions, Section 7 refers to counties of less than 50,000 population, and the liability for the wrongful acts of the county clerk is governed by the last paragraph of Section 8, while Section 11 now refers to counties of 50,000 to 80,000 population, wherein the county clerk is made the budget officer, and counties of more than 80,000, wherein the presiding judge is made the budget officer or the county clerk may be designated as budget officer by Sections 9 and 9d, Laws of Missouri, 1939, page 657. And as heretofore pointed out, the penalties for the wrongful acts of the county clerk in counties of greater population are established by Section 20.

Having heretofore held that Section 20 is broad enough to cover any change in the designation of the title of the office, which in this instance is the county clerk, we are of the opinion that the revisions of 1937 and 1939 have made no material changes in the duties and liabilities of the county clerk, and his bond containing the usual covenants to the effect that he shall faithfully perform all duties of his office and account for all moneys, his bondsmen would be liable for warrants issued covering purchases made in excess of the budget estimates of any official or department.

With reference to pointing out particular instances wherein liability might be established against the county clerk in counties of less than 50,000 population and over 50,000 population, we think the provisions of the various statutes would have to determine the situations as they might arise and would have to be passed on individually. In other words, if the county clerk failed, omitted, neglected or acted contrary in violation of or wrongfully carried out his duties under any section in any county, he might be liable under his official bond.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

INSURANCE:
COUNTY COLLECTOR: County Collector pays insurance tax under Section 5978a. Laws of Missouri, 1939, page 461, to State Treasurer, general county revenue and school fund in same proportion as taxes are now distributed for real estate.

May 16, 1940 9.7

FILED 83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Attention - Mr. W. A. Holloway
Chief Clerk

Dear Sir:

We are in receipt of your request for an opinion dated April 23, 1940, which reads as follows:

> "The 60th General Assembly passed Sections 5978a and 5978c relative to the assessment, collection and distribution of tax on certain stock insurance companies; and we have been requested to obtain an opinion from your office setting out and clarifying the law for the county collector concerning the distribution of this money as to state, county and school.
>
> "As this money is now in the hands of the collectors subject to distribution, it would be appreciated if we could obtain this opinion at your earliest convenience."

Section 5978a. Laws of Missouri, 1939, page 461, reads as follows:

> "Every stock insurance company organized under the provisions of Article 6, Chapter

37 of the Revised Statutes of Missouri, 1929, shall annually pay a tax upon the direct premiums received during the preceding year, whether in cash or notes, in this state and on account of business done in this state at a rate of 2 per cent per annum in lieu of all other taxes except taxes on real estate, taxes on incomes and on franchises and license taxes; Provided, that said insurance companies shall be credited with canceled or returned premiums, actually paid during the year in this state."

Section 5978c, Laws of Missouri, 1939, page 462, partially reads as follows:

" * * * On or before the first day of April in each year the county assessor shall notify each company so assessed by him of the amount of taxes due from it on the assessment of its premiums, and such taxes shall be paid by such company to the county collector of the county in which such assessment was made on or before the first day of May next ensuing. The moneys paid as a tax upon such premiums to the county collector shall be distributed and paid by such collector to the state treasurer and to the county treasurer in the same proportions as taxes collected in the same year on real estate are distributed and paid, and the amounts distributed to such county treasurer, as hereinabove provided, shall be placed to the credit of the general revenue fund of the county and to the credit of the county school fund in the same proportions as the amount of taxes received by the county collector in such year

> from real estate are credited to said county revenue fund and to the county school fund. Whenever the word 'county' occurs herein it shall be construed to include the city of St. Louis; and wherever the words 'county assessor' occur they shall be construed to include the assessor of the city of St. Louis; and wherever the words 'county collector' occur herein they shall be construed to include the collector of the city of St. Louis."

It will be noticed under the above partial section that the county collector is commanded to distribute the tax of 2% as set out under Section 5978a, supra. It specifically states that he shall first distribute the share to the state treasurer and next distribute the share to the county treasurer, which share must be divided between the county revenue fund and the school fund. The share directed to be paid to the state treasurer will be the same proportion to all counties and includes the levy made by the state legislature for the state revenue and also all state taxes for the payment of bonded indebtedness or renewal bonds issued in lieu thereof. The state levy is made by reason of Section 9866, Laws of Missouri, 1939, page 855, which reads as follows:

> "There shall be annually levied, assessed and collected on the assessed value of all real estate and personal property, subject by law to taxation in this state, five cents on each one hundred dollars valuation for state revenue."

In all counties the same proportionment as to the state for the one hundred dollar valuation will be the same; but as to the proportionment paid by the collector the county revenue fund and school fund will differ in most

of the counties for the reason that the limitation of assessment for each one hundred dollar valuation is different in certain counties as set out in section 9873 R. S. Missouri, 1929. Under section 9873, supra, the limitation of the levy for county purposes depends upon the assessed valuation of the property in the county. This limitation does not apply as to taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof.

Webster's Dictionary defines "proportion" as "the relation of one portion to another or to the whole, or of one thing to another as respects magnitude, quantity or degree."

Section 9867 R. S. Missouri, 1929, reads as follows:

> "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

This section applies to the assessment, levy and collecting in the several counties of this state.

Section 9873 R. S. Missouri, 1929, which follows Section 11, Article 10, of the Constitution of the State of Missouri sets out the limitations of taxes to be levied for county purposes and is too lengthy to set out in this opinion. This section sets out the limitations of different counties in proportion to the valuation of the property in the county. The limitations set out in Section 9873 R. S. Missouri, 1929,

has no relationship to the special additional levy that may be ordered under Section 9868 R. S. Missouri, 1929, which applies to the method of making a special additional levy. It was so held in the case of State ex rel v. Railway, 247 S. W. 182.

On a one thousand dollar assessment on real estate, if the state levy was for five cents on the one hundred dollar valuation the collector should pay into the state fifty cents for the state levy. If the county levy was fifty cents a hundred on real estate assessed at one thousand dollars, the revenue of the county would be entitled to the sum of five dollars. If the school levy was fifty cents on a one hundred dollar valuation on real estate a piece of real estate valued at $1,000.00 would be liable for taxes in the amount of five dollars, which should be paid into the county school fund. In other words, the state would be entitled to fifty cents, the county five dollars, and the school fund five dollars. If, under section 5978a, supra, the insurance company should pay into the county collector twenty-one dollars, he should distribute it to the state treasurer and to the county treasurer for the general revenue fund of the county, and to the credit of the county school fund in the same proportion as the amount of taxes received by the county collector in <u>such year</u> from real estate or credited to said county revenue fund and to the county school fund. In other words, the state treasurer would be entitled to one dollar and ten dollars should be credited to the general revenue fund of the county and ten dollars should be credited to the county school fund, on property of the value of $1,000.00, as above set out and under the levy as above set out.

Taking into consideration the definition of "proportion," as above set out, one dollar distributed to the state treasurer bears the same proportion to the whole tax collected as one dollar bears to the twenty-one dollars paid into the county collector by the insurance companies.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

CRIMINAL COSTS: Acquittal or dismissal of a case charging larceny of an automobile, tires or parts of an automobile of the value of more than thirty dollars charges the costs to the county and not the state.

June 3, 1940

6-6

FILED 83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of June 1, 1940, which reads as follows:

> "We have on file for payment from Howell County, a cost bill in the case of State vs. Valentine. The defendant in this case was charged with stealing two 750 x 20 truck tires, two innertubes and rims, personal property value of $75.00. The defendant was tried by a jury and acquitted. A cost bill has also been presented from Dunklin County in the case of State vs. Garland. This defendant was charged with stealing one automobile tire, tube and wheel, and one radiator ornament of the value of $33.00, and the charge against him was dismissed. We call your attention to Sections 4064 and 4065 R. S. Mo. 1929, relating to grand larceny and to Section 7786 R. S. Mo. 1929, relating to larceny of an automobile or automobile equipment.
>
> "We desire your official opinion whether the costs in these cases are payable by the state or county."

Section 4064 R. S. Missouri, 1929, reads as follows:

> "Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Section 4065 R. S. Missouri, 1929, reads as follows:

> "Persons convicted of grand larceny shall be punished in the following cases as follows: First, for stealing an automobile or other motor vehicle, by imprisonment in the penitentiary not exceeding ten years; second, for stealing a horse, mare, gelding, colt, filly, mule or ass, by imprisonment in the penitentiary not exceeding seven years; third, in all other cases of grand larceny, by like imprisonment in the penitentiary not exceeding five years."

It will be noticed in the above section that it is specifically stated that the stealing of an automobile or other motor vehicle is subject to imprisonment in the penitentiary for a period not exceeding ten years. It therefore implies that the minimum shall be two years in the penitentiary and not a fine or county jail sentence.

Section 7786, par. (a) R. S. Missouri, 1929, reads as follows:

> "Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, or any part, tire or equipment of a motor vehicle of a value of $30.00 or more, or any person who shall be convicted of attempting to feloniously steal, take or carry away any such motor vehicle, part, tire or equipment, shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars ($1,000) or by both such fine and imprisonment."

Under this paragraph it will be noticed that the penalty set out is a fine and a maximum of twenty-five years in the penitentiary. It will also be noticed that this penalty is included not only for the stealing, taking or carrying away of a motor vehicle, but also for the stealing, taking or carrying away of any part, tire or equipment of a motor vehicle of the value of thirty dollars or more.

The two penalties have been construed in the case of State v. Mangiaracina, 125 S. W. (2d) 58, par. 1-4, where the court said:

> "However, appellants are insisting that in the circumstances here involved they may not be charged in the same count with the larceny of the automobile and the larceny of the fur coats, although both were consummated by the same act. Sec. 7786 is a later enactment than Secs. 4064 and 4065; and said Sec. 7786 deals with the subject matter of the larceny and attempted larceny of automobiles,

whereas Secs. 4064 and 4065 deal with the common subject matter of grand larceny. We adopt a quotation from State v. Harris, 337 Mo. 1052, 1058, 87 S. W. 2d 1026, 1029(6), citing additional authority, as applicable to the general effect of Sec. 7786 upon said Secs. 4064 and 4065: '"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one * * *."' Our General Assembly in the enactment of Sec. 7786 expressly provided that 'all laws or parts of laws contrary to, inconsistent or in conflict with any of the provisions of this act are hereby repealed * * *.' Laws 1st Ex. Sess. 1921, p. 106, Sec. 31. Thus a clear legislative intent to take the larceny or attempted larceny of the automobile here involved out from under the general provisions of Secs. 4064 and 4065 and to treat such larceny as an offense separate and apart from the offense denounced and punishable under the comprehensive terms of Secs. 4064 and 4065 is

> manifested. It follows that the instant information, charging in one count the larceny of the automobile and the larceny of the fur coats, charges offenses denounced by separate provisions of our statutes, calling for separate and distinct punishments, with Sec. 7786 permitting of a lighter punishment than that prescribed by Sec. 4065."

In this case the court has held that the larceny of an automobile should be punishable under the later section, which is 7786, supra, and not under the general section which is section 4065, supra. The holding in this case referred to the stealing, taking and carrying away of an automobile but under the same section 7786, supra, it describes "or any part, tire or equipment of a motor vehicle" of the value of thirty dollars or more. The same holding would be held in the above case if it had been automobile parts of the value of thirty dollars or more.

Under Section 3828 R. S. Missouri, 1929, where the punishment of a crime is solely in the penitentiary, and not in the county jail or a fine, upon an acquittal the state must pay the costs and not the county, and if the defendant is acquitted the costs must be paid by the state. But in all other cases, where the punishment may be in the county jail, or by a fine, upon an acquittal the county must pay the costs. This section reads as follows:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all

> other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Under Section 3826 R. S. Missouri, 1929, where a defendant is convicted and sentenced to the penitentiary in capital cases and in cases which are punishable solely by imprisonment in the penitentiary, or where the defendant is sentenced to imprisonment in the county jail, workhouse, or reform school, because such person is under the age of eighteen years, the state shall pay the costs. This section reads as follows:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed

> two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Under Section 3827 R. S. Missouri, 1929, the county must pay the costs and not the state, where the defendant is sentenced to imprisonment in the county jail or to pay a fine or both. This section reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant.

In all of the above sections, 3828, 3826 and 3827, R. S. Missouri, 1929, neither the county nor the state are compelled to pay the costs where the defendant can pay the costs.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that where a defendant is charged with stealing two truck tires, two innertubes and rims of the value of Seventy-five ($75.00) Dollars, and was acquitted by a jury the county would be liable for the costs and not the state, for the reason that the punishment that could be given is not solely imprisonment in the penitentiary. It is also further

the opinion of this department that where a defendant was charged with stealing one automobile tire, tube and a wheel and one radiator ornament of the value of Thirty-three ($33.00) Dollars, and the charge against him was dismissed, the county should pay the costs and not the state.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW

COUNTY TREASURERS: County treasurers are the insurers of all moneys coming into their hands and are not relieved of such responsibility by Section 12198, R. S. Mo. 1929, unless there is a substantial compliance with Article IX, Chapter 85, R. S. Mo. 1929, notwithstanding said funds are held by the bank as trustee ex maleficio.

December 19, 1940

12-30

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of December 3, 1940, wherein you ask for an opinion upon the following statement of facts:

> "Our Company executed the two above described bonds for Fred B. Black at the beginning of his term as Treasurer January 1, 1937, at which time legal depositories were provided in Jasper County for the County funds, said depositories furnishing security as provided by law at that time.
>
> "Effective August 1, 1939, letters were addressed to the County Court of Jasper County, Missouri, by the Bank of Carthage and by the Central National Bank at Carthage, Missouri, in which each of them offered to accept one-half of the County money, but this agreement provided for the pledging of no securities to guarantee the deposits. On the same date, the County Court of Jasper County, Missouri, made the following order:
>
> "'Be it ordered by the County Court that the County Treasurer be, and he is hereby ordered to deposit all county funds that may come into his hands during the period beginning August 1, 1939 and continuing until

the adjournment sine die of the May Term, 1941, of the County Court, in the following banks: Bank of Carthage, Carthage, Missouri; Central National Bank of Carthage, Missouri.

"Be it further ordered by the County Court that the Treasurer be directed to make daily deposits in said banks of such county funds as may come into his hands, and that such funds shall remain therein uhtil properly disbursed as provided by law, and not transferred elsewhere, except upon order of record made by the County Court, and that as nearly as practicable the balances maintained in each such bank shall be equal.

"Be it further ordered by the County Court that this order be made a matter of record by the County Clerk and that he shall deliver a certified copy of this order to the County Treasurer.'

"Since the date of this order, neither of these Banks has furnished any security other than their membership in the Federal Deposit Insurance Corporation, guaranteeing the re-payment of the County deposit. It would seem from several Court decisions here in Missouri that these Banks are accepting County deposits illegally and that such money that is deposited by the County Treasurer would constitute trust funds and be a preferred claim upon the assets of these Banks. This being so, the County probably is amply protected, but the statutes requiring the depositories to pledge securities equal to their maximum deposit is not complied with and the County Court has not required the Banks to comply with the statutes.

> "Under the circumstances, should the Treasurer follow the order of the County Court or is it his duty to bring action forcing the County Court to provide legal depositories in keeping with statutory requirements? Who is responsible to see to it that the statutes are complied with? Is it satisfactory with your Department that the law is not complied with?
>
> "Mr. Black has been elected for a term to succeed himself and our ability to make the bond covering his new term will depend greatly upon his responsibility, if any, for the failure of the County Court to take security from the county depositories."

In the case of State ex rel. The Township v. Powell, 67 Mo. 395, the court quoted with approval the following statement of law as declared in the case of United States v. Prescott, 3 How. 578:

> "Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity."

In tracing the authorities, we find that in the case of University City v. Schall, 205 S. W. 631, l. c. 633, the aforesaid cited case was approved by the court and also in the case of City of Fayette v. Silvey, et al., 290 S. W. 1019.

In the case of Glaze et al. ex rel. Board of Supervisors of Harrison County Drainage District v.

Shumard et al., 54 S. W. (2d) 726, l. c. 728, 227 Mo. App. 434, the court had this to say:

> "Since it is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise, * * * the depositing of such funds by the county treasurer and ex officio collector, to his account as county treasurer in the Bethany Savings Bank, was at his peril."

Bragg City Special Road District v. Johnson, 223 Mo. 990, 20 S. W. (2d) 22; Butler County v. Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047.

Therefore, from the reading of the aforesaid cases it has been the uniform rule that public officers charged with public funds are charged with the safekeeping and are the insurers of said funds against all hazards unless they are relieved of this responsibility by some statute.

Now turning to Section 12198, Article IX, of Chapter 85, R. S. Missouri 1929, which has to do with county depositaries, we find that said section reads as follows:

> "The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

The aforesaid section, without question, would

relieve the county treasurer from liability provided he placed the funds in a legally selected depositary. However, from reading your letter, the question arises whether or not the county court of Jasper County has legally selected a depositary in accordance with Article IX, Chapter 85, supra.

We find from reading your letter that neither the Bank of Carthage northe Central National Bank has furnished any securities and we have further learned that the banks in each monthly statement made to the county court report that the moneys are held "Special deposit of public and funds belonging to Jasper County, Missouri, to be held by this bank and to be disbursed only on checks issued and signed by the County Treasurer or his authorized agents." This communication was made known to this office through a letter dated December 11, 1940, by Fred B. Black, County Treasurer.

In the case of Liquidation of Peoples Bank of Butler v. Moberly, 127 S. W. (2d), page 669, l. c. 671, the court had this to say:

> "Mount Pleasant Township did not designate a depositary for its funds, but deposited them in the three banks named which were acting as county depositaries. Appellant contends that none of these banks was lawfully designated as a county depositary and the township is therefore entitled to a preference, on the theory that the deposits were illegal and that the banks are trustees ex maleficio.
>
> "The selection of county depositaries is governed by Article 9, Chapter 85, R. S. Mo. 1929, sections 12184-12198, inclusive; Mo. St. Ann. sections 12184-12198, pp. 6455-6465. In brief, they provide: the county court shall select a depositary at the May term every two years; it shall divide the county funds

into not less than two nor more than ten equal parts; cause notice to be published; receive sealed proposals as to rate of interest the banks offer to pay on the funds for the ensuing two years, the bids to be accompanied by certified checks, etc.; the bids shall be publicly opened and recorded on the first day of the May term and a depositary or depositaries be selected on condition that the specified bond be executed and approved; section 12188 Mo. St. Ann. Section 12188, p. 6461, provides that if a township board fails to select a depositary its funds shall be deposited in the county depositary. Other provisions of the statute are not material to the present discussion.

"We have held the requirements of these statutes mandatory and that a failure of compliance prevents title to the public funds passing to the bank and the relation of creditor and debtor arising. Harrison Township v. People's State Bank, 329 Mo. 968, 46 S. W. 2d 165; In re Cameron Trust Co., 330 Mo. 1070, 51 S. W. 2d 1025; Marion County v. First Sav. Bank, 336 Mo. 675, 80 S. W. 2d 861; White v. Greenlee, 330 Mo. 135, 49 S. W. 2d 132; Denny v. Jefferson County, 272 Mo. 436, 199 S. W. 250; Huntsville Trust Co. v. Noel, 321 Mo. 749, 12 S. W. 2d 751. We have also held that a literal compliance with all the statutory provisions is not required, if no public or private right is prejudicially affected. Boone County v. Cantley, 330 Mo. 911, 51 S. W. 2d 56; Wright County v. Farmers' & Merchants' Bank, Mo. Sup., 30 S. W. 2d 32; Henry County v. Salmon, 201 Mo. 136, 100 S. W.

20; Town of Canton v. Lewis County Bank, 338 Mo. 817, 92 S. W. 2d 595; Mitchell v. Bank of Ava, 333 Mo. 960, 65 S. W. 2d 99; School Dist. of St. Joseph v. Security Bank, 325 Mo. 1, 26 S. W. (2d) 785."

In the case of Harrison Township, Vernon County, et al. v. People's State Bank of Bronaugh et al., 46 S. W. (2d), page 165, l. c. 166, the court had this to say:

"Under article 9, c. 85, R. S. 1929, it was the duty of the township board of Harrison township to select a depository for the funds belonging to said township and secure from the depository a bond faithfully to account for and pay the sums deposited. Heitz, in charge of the fund, had no right to make the deposit in his name as trustee, the bank not having been selected as depository, and when he did take charge of said fund he was charged with a trust to account for it.

"When the People's State Bank received that fund from Heitz and placed it to his credit, it was impressed with the same trust in the hands of the bank. The relation of debtor and creditor did not obtain between the bank and the depositor. The bank took the money, according to the stipulation, knowing the funds to be public moneys belonging to the plaintiffs. The funds, being commingled with other assets of the bank, had augmented those assets in that amount. Huntsville Trust Co. v. Noel, 321 Mo. 749, 12 S. W. (2d) 751, loc. cit. 754; State ex rel. Gentry v. Page Bank, 322 Mo. 29, loc. cit. 36, 14 S. W. (2d) 597; Clearmont School

District v. Jackson Bank (Mo. App.)
37 S. W. (2d) 1006.

"Since this trust fund added that amount to the assets of the bank, the general creditors are in the same position with the preference allowed as if the deposit had not been made. There is nothing to show that any one deposited or otherwise gave credit to the bank on the strength of that particular asset."

Therefore, from reading the cases, supra, in reference to the selection of county depositaries, we question whether there has been a substantial compliance with Article IX, Chapter 85, R. S. Missouri 1929, and believe the county funds are held by aforesaid banks as trustees ex maleficio, and if the banks were to go into liquidation the county, no doubt, would have to resort to appropriate legal measures to obtain whatever money was in the banks at the particular time, and under the decisions, supra, would be entitled to a preferred claim against the bank assets, and it is our opinion that the county treasurer, however, would not be absolved from liability.

The situation presented in your letter is indeed a regrettable one and is confronting the county officials of many of the counties throughout the State of Missouri. Such situation having been brought about by the depression and different demands and conditions under which all banks are now operating, and the sections of the statute which have been passed by the past Legislature cannot now be carried out and this situation should be alleviated immediately by the Legislature and suitable laws should be immediately enacted which would set forth a plan for the handling of county moneys to meet the time in which we are now living.

CONCLUSION

In conclusion we are of the opinion that the county treasurer is the insurer of the county funds for

the reason that there is not a substantial compliance by the Bank of Carthage and the Central National Bank of Carthage.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:DA

COUNTY COURT: Does not have jurisdiction over construction of dams to create lakes on private property.

April 10, 1940.

H-11

FILED
84

Hon. B. F. Spratt, Presiding Judge
Platte County
Platte City, Missouri

Dear Judge Spratt:

We are in receipt of your letter of April 5th, wherein you state as follows:

> "Does County Court have jurisdiction over construction of Dams to create lakes on private property when such lake might be a menace to other property owners?
>
> "We would appreciate an opinion on this matter at your earliest convenience."

67 C. J. 919 provides in part that:

> "In the absence of statutory restrictions, a riparian owner may, for his own lawful purposes, as an incident to his ownership, lawfully erect a dam across a stream on his own land * * * "

An examination of the statutes of this state (9178 R. S. Mo. 1929) reveals that any person who builds any dam across any watercourse without first obtaining permission from the county court is liable for double damages if he works any injury to any person.

> "Any person who shall build or heighten any dam, or any other stoppage or obstruction on or across any watercourse, without first obtaining permission from the court of the proper county, according to law, and shall thereby work any injury to any other person,

> shall forfeit to the party injured double damages for such injury, to be recovered by civil action."

The above section applies to the construction of "any dam" and would therefore include the construction of a dam on private lands. The fact that permission must be obtained from the county court to build the dam does not give the county court jurisdiction over construction.

The water dammed up to form the lake would of course also have to be a "watercourse" to even require "permission" from the county court. The term "watercourse" has been defined in the case of Keener vs. Sharp 341 Mo. 1192, 111 S. W. (2d) 118 l. c. 120.

> "In the case of Munkres v. Kansas City, St. Joseph & Council Bluffs Railroad Company, 72 Mo. 514, this court approved the following definition of a water course: 'A water course is a stream or brook having a definite channel for the conveyance of water. It may be made up, more or less, from surface water from rains and melting snow, but after it enters into a channel and commences to flow in its natural banks, it is no longer to be considered surface water and it is not essential that the water should continue to flow in such stream constantly the whole year around; it is sufficient if the water usually flows in such channel, though not continually. That is, to constitute a branch or stream there must be something more than a mere surface draining, swelled by freshets and melting snow, and running occasionally in hollows and ravines, which are generally dry. The water must usually run in a definite bed or channel, though it need not flow continually the year round. But although the water from high lands and hills may unite and form a stream with a definite channel, yet if it afterward ceases to remain a channel,

but spreads out over the surface of low lands, and runs in different directions in swags and flats without any definite channel, it ceases to be a stream or water course.'

"We again approved the above definition in the case of Sigler v. Inter-River Drainage District, 311 Mo. 175, 279 S. W. 50. Recently the St. Louis Court of Appeals, in the case of Dardenne Realty Co. v. Abeken et al., 106 S. W. (2d) 966, quoted this definition with approval."

You don't point out how the lake might become a menace to other property owners, however Section 9179 R. S. Mo. 1929, provides how circuit courts may under certain circumstances prevent the construction of a dam.

"The circuit court of the proper county shall have power, upon petition, to prevent the erection or raising of any dam, stoppage, or obstruction across any stream which shall operate as a nuisance and be injurious to any mill, electric power and light works, or other machinery erected, or which shall dam up and render impure or unwholesome or unhealthy the waters of said stream at any point where water is or may be taken from said stream to supply the inhabitants of any city or town or village in the state with water, or of any dam, the erection of which has been authorized by the order of any competent tribunal, of a date earlier than that permitting the erection and raising of such first mentioned dam, stoppage or obstruction; and such court may, upon a final hearing of such petition, order and adjudge that such dam, stoppage or obstruction be abated by the sheriff of the proper county."

From the foregoing we are of the opinion that the county court does not have jurisdiction over the construction and building of a dam to create a lake on private property even though the lake might become a menace to other property owners.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting) Attorney General.

MW/mc

GRAND JUROR: Fees as a witness in other proceedings.

February 27, 1940

2-27

FILED
85

Mr. Willis Stephens
Clerk of the Circuit Court
Dent County
Salem, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of February 16, 1940, which reads as follows:

> "Mr. M. Butts was summoned and served as a Grand Juror at the August term Circuit Court 1939, he was also subpoenaed about the same time to serve as State witness in case State of Missouri vs. Bryan Mounce. The Grand Jury was in session every day of the Circuit Court term. Mr. Butts thinks that he should be paid for both. He was paid for all of the time as Grand Juror."

We are herewith enclosing copy of an opinion which was rendered by this department to Mr. Nat W. Benton, Prosecuting Attorney, Greene County, on March 23, 1938, which goes into the right of grand jurors to collect mileage, etc.

We are assuming for the purposes of this opinion that Grand Juror M. Butts received his full compensation in the office of grand juror, and the only question that is confronting you is whether or not he is entitled to witness fees. Section 11798, R. S. Mo. 1929, reads as follows:

> "Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner,

clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, $1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, or before such justice, and withdrawn himself from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

It will be noted that in the aforementioned section the title to said section reads, "Fees for witnesses", and the first line of the section reads, "Witnesses shall be allowed fees for their services * * *." Then the section goes on and sets out the per diem, etc. It will also be

noted that the section provides, "* * * but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; * * *"

So the first question involved is whether or not, when Mr. Butts served as a grand juror on this particular day, he was prohibited, because of that fact, from collecting witness fees, as is set out in the aforementioned section.

In 12 R. C. L. at page 1014, under definition, a grand jury is regarded rather as an informing or accusing body than as a "judicial tribunal". Therefore, the members of this tribunal do not themselves act as witnesses, but are a body before whom witnesses appear and give testimony. This being a fact, we are of the opinion that a grand juror could not be charged and held to the prohibition as set out in Section 11798, wherein it is said, "* * * and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. * * *" Furthermore, this section reads, as heretofore set out, that witnesses shall be allowed fees for their services.

Section 3837, R. S. Mo. 1929, reads as follows:

> "No officer, appointee or employee holding a state, county, township or municipal office, including police officers and policemen, either by election or appointment, shall claim, be allowed or receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury, or in any criminal cases. All officers, appointees and employees as aforesaid, shall be compelled to attend the trial of all criminal cases, coroner's inquests and grand juries, when legally subpoenaed: Provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the

> trial or coroner's inquest is held, or where the grand jury is in session: Provided further, that the provisions of this section shall not apply to prevent any officer, who is a member of any police relief association organized under the laws of this state, from receiving witness fees for the benefit of said relief association of which he is a member in all cases in all courts of record; coroner's inquests, justice of the peace courts, whenever attending therein in matters pertaining to the discharge of their duties as witnesses; said witness fees to be collected solely by such officer as may be designated and authorized to collect the same, under the corporate authority of said relief association and for its exclusive benefit."

It will be noted from the aforesaid section that certain officers are not entitled to receive witness fees. Therefore, the question arises as to whether or not a member of a grand jury comes under the prohibition of this section and precludes him from receiving fees under Section 11798.

In the case of People v. Hopt, 3 Utah, 396, l. c. 401, the court, in that case, differentiated between an officer and a juror, and reached the conclusion that a juror was not a public officer.

In the case of Territory v. Hopt, 4 Pac. 250, l. c. 255, the court, in ruling that a juror was not a public officer, reasoned thusly:

> "In U. S. v. Hartwell, 6 Wall, 393, the court say: 'An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, employment and duties.'

Mr. Bouvier, in his dictionary, defines office to be 'a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.'

'The idea of an office, clearly defined, embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty; a public employment confirmed by appointment of government.' Burrill, Law Dict.

In 20 Johns. 493, Platt defines office to be 'an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental.'

An office is defined to be 'a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.' Streeter v. Rush, 25 Cal. 98; People v. Stratton, 28 Cal. 388.

Jury duty is in the nature of service due from the citizen to the government, necessarily required in the administration of its laws. Its character has but little similarity to tenure, duration, power, and the right to exercise powers conferred by the appointment of government, which are essential characteristics of office, 'and not mere transient, occasional, or incidental.' The name of the man is selected, and, with 199 others, is placed in a box which is denominated the jury-box, from which it is drawn by chance; and, without his knowledge of any previous steps, he is summoned to appear in court to perform the duty of a juror. It is true, he has a duty of a public nature to perform, and for it he is compensated out of the public

> treasury; but in what other respect does his position or his duties correspond with the essential elements of office? He has no certain term of office. He has no right to, and has no power to enforce a right to, the performance of any act or service which constitutes the performance of official duty. He is liable at any moment to be discharged by the court from all service; and to be excused by either party from serving in the trial of any cause without consulting his wishes or interests. The oath he takes, in its terms and scope, limits his duty to the facts of the particular case then on trial, and is not the oath required by the laws of this territory, or by the constitution and laws of the United States, to be taken by public officers. State v. Bradley, 48 Conn. 535. The position of a juryman is, to a certain extent, a 'place of public trust and emolument,' but not in the sense of these statutory provisions."

Industrial Commission v. Rogers, 171 N. E. 35; Adams v. State, 17 N. E. (2d) 84.
See also 35 C. J., page 428.

In conclusion, we are of the opinion that Grand Juror Butts is not precluded under Section 3837, R. S. Mo. 1929, or under the prohibition set out in Section 11798, R. S. Mo., and is, therefore, entitled to collect his witness fee for the day he testified. However, in accordance with the opinion herewith enclosed, we are of the opinion that he has received his mileage, and, being present in the town where he gave his testimony, it was not necessary for him to travel in order to testify, and he would only be entitled to the witness fee.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT

MUNICIPAL CORPORATIONS: NUISANCES: Construction of Section 7202, R. S. Mo. 1929 - Cities of the fourth class have right to abate nuisances and issue special tax bills against the property for the expenses incurred.

July 28, 1940

8-21

FILED
85

Honorable Roy W. Starling
Attorney at Law
Eldon, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated May 1, 1940, together with Ordinance No. 282, the former which reads as follows:

> "I am herewith enclosing a copy of Ordinance No. 282 of the City of Eldon, Missouri, a City of the Fourth Class.
>
> In the City we have a number of residences not within the sewer district and not provided with a private sewage treatment plant. On these properties ordinary, open, outside toilets are located. You will observe that, by Section III. of this ordinance, if after notice is given by the proper officer the owner or the occupant of the property does not provide one of the three approved methods of disposal of human excreta, the city is given the power to do or have done the things necessary to comply with the provisions of this ordinance and to issue a special tax bill in payment of the cost.
>
> The Mayor and Board of Aldermen would like an opinion from your department as to whether a buyer of property sold under one of the special tax bills so issued would take good title to the property.

I have had some doubt as to the authority of a city of the fourth class to issue special tax bills in payment of improvements of this type."

Section 7023, R. S. Mo. 1929, reads as follows:

"The board of aldermen may make regulations and pass ordinances for the prevention of the introduction of contagious diseases in the city, and for the abatement of the same, and may make quarantine laws and enforce the same within five miles of the city. They may purchase or condemn and hold for the city, within or without the city limits, within five miles therefrom, all necessary lands for hospital purposes, waterworks, sewer carriage and outfall, and erect, establish and regulate hospitals workhouses, poor-houses, and provide for the government and support of the same, and make regulations to secure the general health of the city, and to prevent and remove nuisances: Provided, however, that the condemnation of any property outside of the city limits shall be regulated in all respects as the condemnation of property for railroad purposes is regulated by law; and provided further, that the police jurisdiction of the city shall extend over such land and property to the same extent as over public cemeteries, as provided in this article."

Section 7207, R. S. Mo. 1929, reads as follows:

"The legislative or governing bodies of cities organized under the general

> statutes or special charters shall have, and they are hereby granted the power to suppress all nuisances which are, or may be, injurious to the health and welfare of the inhabitants of said cities, or prejudicial to the morals thereof, within the boundaries of said cities and within one-half mile of the boundaries thereof. Such nuisances may be suppressed by the ordinances of said cities or by such act or order as the charters of said cities authorize them to adopt. If the nuisance is suppressed within the city limits, the expense for abating the same may be assessed against the owner or occupant of the property, and against the property on which said nuisance is committed, and a special tax bill may be issued against said property for said expense."

Paragraph 588, 43 Corpus Juris, reads in part as follows:

> "Toilets, water-closets, privies, and cesspools may be the proper subject of municipal regulation. The power of a municipal corporation to do so is usually derived from its police power. The regulation must be reasonable. The power to regulate does not include the power to prohibit. * * * "

In State ex rel. Pickering v. City of Willow Springs, 230 S. W. 352, l. c. 353, the court had this to say:

> "As to whether the alleged nuisance is in fact a nuisance and subject to abatement is a question of judgment on the part of the legislative

> body of the city, and certainly we have no authority to direct the subject-matter of legislation on the part of the city council. It is their duty to relieve the inhabitants of the city of this nuisance; but such duty is not, in the state of this record, a ministerial duty, and therefore cannot be directed in mandamus."

In the case of St. Louis v. Nash, 260 S. W. 985, l. c. 986, we find the following:

> "(3) IV. It is a proper and constitutional exercise of the police power of the state for the protection of the public health to require privy vaults to be removed and replaced by water closets. * * * * * * * * * *
>
> (4) V. In the exercise of police power of the state, a municipality may lawfully require a property owner to alter or reconstruct an existing building without compensation, when such alteration or reconstruction is reasonably necessary to insure the public safety or to protect the public health. * * * * * "

In the case of City of St. Louis v. Hoevel Real Estate and Building Co., 59 S. W. (2d) 617, Judge Gantt had this to say in ruling and in passing upon the case of St. Louis v. Nash, supra:

> "In that case, as in this case, the defendant was charged with a violation of the section. In ruling the question we held that the enactment was a valid exercise of the police power, and that the section was not in conflict with the

> State and Federal Constitutions. Furthermore, we held that 'in the exercise of police power of the state, a municipality may lawfully require a property owner to alter or reconstruct an existing building without compensation, when such alteration or reconstruction is reasonably necessary to insure the public safety or to protect the public health.' We adhere to our ruling in that case."

In the case of Ratchford v. City of Gastonia, 177 N. C. 376, l. c. 379, which we copy to show the similarity to the instant case, the court had this to say:

> "The public health is a matter of importance to the entire neighborhood, and especially to all the inhabitants of a town or city, for the indifference or ignorance or neglect of one man will nullify the precautions taken by all others in that locality. Such ordinance as is here in question is a necessary protection, which will be extended in its scope with the increase of knowledge and can never be diminished. The requirement of sewerage will be better than such ordinance as this which is the minimum.
>
> The enforcement of such regulations as this by an officer appointed by the city directly through its officers and employees is not only more economical but it is the only method of making it efficient. * * * "

In conclusion, we are of the opinion that it was the legislative intent, in Section 7207, R. S. Mo. 1929, that cities of the fourth class (as in this particular instance) should have power to pass the necessary ordinance to suppress nuisances, as explained in your letter and ordinance attached, and that the city should have the further right to assess against the owner or occupant

of the property the expenses. If the nuisance is suppressed within the city limits, the expense for abating the same may be assessed against the owner or occupant of the property. Upon his or her failure to pay, the city, under proper ordinance, would have the right to issue a special tax bill against said property for said expenses.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

BRC:VC

SCHOOL DISTRICTS:
TAXATION:
EXTENSION OF BOUNDARIES:

Property in territory included in extension of boundaries of school district is liable for taxes assessed and levied thereon from and after the date of such extension.

February 15, 1940

2-16

FILED
86

Honorable Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following statement of facts:

"An opinion is requested relative to the interpretation to be given Section 9325 as Amended Laws, 1937, p. 449, relative to the effect thereof in the light of the school districts and the assessment and collection of taxes.

"In the spring of 1939 the City of Jackson, by an election, extended its limits, taking in territory which was a part of a rural school district. The plat covering the extension has not as yet been filed in the Recorder's Office.

"An opinion is requested as to, first, are the residents within the extended area compelled to send their children to the city schools? Second, assessor of Cape Girardeau County and likewise the city assessor in Jackson are in a quandary as to the assessments for school purposes, inasmuch as the Statutes provide that assessments shall be levied as of the 1st day of June while the Statute referred to states that such extension of the

> school district's limits shall take effect as of July 1 following the extension. Does this have the effect of holding up the assessment of taxes for the benefit of the Jackson City School District until June 1, 1940, and yet allow the children within the extended area to attend the city schools, during which time the said residents are paying school taxes to the rural school district in which they were formerly located? And, third, does the city's failure to complete and record its plat of the extended area have any material effect upon the questions raised, even though the participants to the controversy all agree as to the location as to the extended limits?"

You state in your request that the City of Jackson, by an extension of its limits in the spring of 1939, took in territory which formerly had been a part of rural school district. The effect of this extension on the school district is provided for by Section 9325, R. S. Missouri 1929, which provides in part as follows:

> "* * * * and every extension that has heretofore been made, or that hereafter may be made, of the limits of any city, town or village that is now or may be hereafter organized under the laws of this state, shall have the effect to extend the limits of such town or city school district to the same extent, and such extension of the limits of any city or town school district shall take effect on the first day of July next following the extension of the limits of such city, town or village: * * * "

Said Section 9325 provides for the extension of

the limits of school districts and changes of boundaries under various circumstances, but we think the foregoing quoted portion of said section is that part which is applicable to your question.

The limits of the City of Jackson were extended apparently by authority of the provisions of Section 6947, R. S. Missouri 1929, which provides in part as follows:

> "* * * * The mayor and board of aldermen of such city, whether the same shall have been incorporated before becoming a city of the fourth class or not, with the consent of a majority of the legal voters of such city voting at an election therefor, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city: Provided, that such election shall be held in accordance with the provisions of article 2, chapter 61, R. S. 1929, and section 6949, of this article, and the same shall be held upon such notice and at such time and place, and the judges and clerks therefor shall be appointed and shall make their returns of the same in such manner as may be prescribed by ordinance or resolution of such city."

I.

Your first question of the request on whether

or not the residents of the newly incorporated territory are compelled to send their children to the city schools, I think that the provisions of Section 9212, R. S. Missouri 1929, are applicable. This Section provides in part as follows:

> "The board of directors of each district shall, between the thirtieth day of April and the fifteenth day of May of each year take, or cause to be taken, and forwarded to the county clerk an enumeration of the names of all persons over six and under twenty years of age resident within the district, designating male and female, white and colored, and age of each, together with the full name of the parent or guardian of each child enumerated; * * * * "

It will be noted by the provisions of this section that all children who are found residing in a certain territory between the thirteenth of April and the fifteenth of May of any particular year should be enumerated as children of that particular district.

Section 9213, R. S. Missouri 1929, provides in part as follows:

> "The board of directors or board of education of any school district in this state mayprovide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district.
> * * * * * * * * * * * * * * * * * "

Since the quoted provisions of Section 9325, supra, stated that after the city, town or village has extended its limits, such extension of limits, which shall include territory in a school district included therein, shall take effect on the first day of July

next following the extension.

Section 9433, R. S. Missouri 1929, provides in part as follows:

> "Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and fourteen years shall cause such child to attend regularly some day school, public, private, parochial or parish, not less than the entire time the school which said child attends is in session, * * * * * * * * * * * "

From this section it will be seen that it is compulsory upon the parent or guardian to send the child, who is of school age, to some school. Since the children within the territory included within the limits of the city as extended are residents of that territory, then under the foregoing sections and from your statement that the limits were extended in the spring of 1939, these children should go to the city schools after July 1st of that year.

CONCLUSION.

Therefore, answering your first question, it is the opinion of this department that the residents within the extending area would be compelled to send their children to the city schools of Jackson.

II.

On your second question, since the extension is effective on July 1, then does this extension have the effect of holding up the taxes for the benefit of the Jackson City School District until June 1, 1940, or does the said school get the benefit of the taxes on the assessment for 1939?

Section 9746, R. S. Missouri 1929, provides

as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

This section seems to have been intended to include all taxes that may be levied on the property during the ensuing year and no exception is made as to whether or not such levy is one that is authorized after the assessment, or is any exception made to a tax that might be levied by the proper authorities in a district to which such property is attached after the date of the assessment. On that particular question, or a similar question, we do not find where it has been before the Missouri Courts. However, we find that a very similar question has been before the appellate courts of Texas. In that State there are laws somewhat similar to the Missouri laws with reference to taxes, the assessment thereof and when such property shall be subject to tax.

In the case of Cadena et al. v. State ex rel. Leslie, 185 S. W. 367, the court had before it a question somewhat similar to the one here and the court said:

> "* * * It is not contended that the authority to levy the maintenance tax was not vested in the board of trustees; the only contention being that, as the district was not in existence on January 1, 1915, no tax could be levied for that year.
>
> "It was evidently contemplated by the Legislature that the people of the district should obtain the benefits of its creation immediately; for it is recited in the law

that the deplorable condition of the public free schools within the territory therein described, not having adequate school accommodations, and not having necessary funds to provide the same, created an emergency and an imperative public necessity for the act to take effect at once. It was clearly intended that the necessary funds for the building and maintenance of schoolhouses should be provided as soon as the law went into effect. It could not have been contemplated that, instead of the law becoming effective immediately or in 90 days after adjournment at the farthest, it should not go into effect until the following year, and yet that would be the logical result if the judgment of the lower court could be sustained. Under that ruling, if the law had gone into effect on January 2d, the tax could not have been levied and collected for that year, because the district was not in existence on January 1st, of the year.

"Cooley on Taxation, pp. 494, 495, is cited as sustaining the position of appellees, and the judgment in this case, but the quotation made therefrom has no reference to a case of this kind. The text has reference to taxes levied for years back of the one in which the levy is made, but not to taxes levied for the current year. This is indicated by several of the cases cited in the footnotes as sustaining the text. For instance, in the case of McClellan v. Railroad Co., 11 Lea (Tenn.) 336, it was held that, where a 20-year exemption expired in March and an assessment was made in April for the

> current year, the party assessed was entitled to no abatement in respect of the time that had already run.
>
> "In the case of People v. Gold Company, 92 N. Y. 383, it was contended by a corporation, which came into existence in November, that it could not be compelled to pay taxes for that year, but the court held that it should be compelled to pay the taxes. The court stated that, if the contention of the corporation should be upheld, no taxes would be collected until January of the second year after it was organized. So in this case, if no tax could have been levied for 1915, appellees could not be forced to pay any maintenance tax until 1917, and in the meantime the schools of the district would be without a maintenance fund."

And in the case of Blewitt v. Megargel County Line Independent School Dist. et al., 285 S. W. at 271, the appellate court of the State of Texas in speaking of the decision in the Cadena case, supra, said:

> "The decision in the case of Cadena v. State (Tex. Civ. App.) 185 S. W. 367, is authority for the proposition that, when an independent school district is created after the 1st of January of a given year, all property within such newly created district, which was owned by the taxpayer on January 1st of that year, 'is subject to any tax authorized by law, whether such taxes have been authorized theretofore or may be authorized during the year, and can be levied by the body given the power

to levy at any time during the year.'"

CONCLUSION.

From the foregoing it is the opinion of this department that the Jackson City School District, as extended, may levy a tax on all property within such district as extended on and after July 1, 1939, and that this levy will be applicable as of June 1 of that year, and all property within that territory is subject to any tax authorized by law for said school district.

III.

On your third question you ask whether or not the failure of the city to complete and record its plat of its extended area would have any material effect upon the question. We think that this question has been answered in the case of Salem ex rel. v. Young, 142 Mo. App. 160, at 169, wherein the court said:

> "Further objection is made to the validity of the supposed extension of the city limits because it included unplatted adjacent territory. There is no foundation for this objection. It was not necessary that respondent's land should have been platted before being included within the extension of the city limits of the city of Salem. Section 4932 of the Revised Statutes of 1879 providing for the extension of city limits empowers the mayor and board of aldermen, with the consent of a majority of the legal voters of the city voting at an election, to extend the limits of the city over any territory lying adjacent thereto. The attempted extension of the city limits was made

under this act, and as will be seen from an inspection of its provisions, such extension is not restricted to platted grounds, and it has been often decided that the limitation of extension of cities of the fourth class is not restricted to platted additions. (Burnes ex rel. v. City of Edgerton, 143 Mo. 563, 45 S. W. 292; Cole v. Skrainka, supra; Copeland v. City of St. Joseph, 126 Mo. 417, 29 S. W. 281; State ex rel. v. Birch, 186 Mo. 205, 85 S. W. 361.)

CONCLUSION.

From the foregoing authority it is the opinion of this department that the failure of the City of Jackson to complete and record its plat of extended area would not have any material effect upon the question of the right to tax citizens and property in the extended area and the duty of the residents of such district to send their children to the city schools.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

HIGHWAY COMMISSION:
ROADS:

Commission may allow coal company to mine state highway.

5/27

May 15, 1940

FILED
86

Mr. Louis V. Stigall
Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri

Dear Sir:

T is department is in receipt of your request for an official opinion which reads as follows:

"There has been filed with the State Highway Commission by the Sinclair Coal Company a petition asking for authority to temporarily close Farm-to-Market State Highway C, in Randolph County, Missouri.

"The Coal Company owns, either in fee or by leasehold, all land abutting this highway, and also owns the coal rights beneath the highway, said ownership being subject only to the public easement. The Coal Company wants to remove the coal from beneath the highway. They will build a detour around the highway which detour will be of the same type and quality and will meet all highway specifications. After the coal has been taken, they will restore the road to its original condition. If this permit is granted, the company will work seventy-five or one hundred men during the summer months, otherwise these men will be out of work. The Commission would like your opinion as to whether we may grant this request or not."

Section 8094, R. S. Missouri 1929, which appears in Article 12, Chapter 42, reads as follows:

> "There is hereby created a state highway commission, which shall be vested with the powers and duties specified in this article, and also all powers necessary or proper to enable the commission, or any of its officers or employees, to carry out fully and effectively all of the purposes of this article."

While as the statute provides the State Highway Commission is vested with all the powers and duties specified in Article 12, still as pointed out in State ex rel. St. Louis County v. State Highway Commission, 286 S. W. 1, 315 Mo. 707, "The State Highway Commission is vested with * * * also all owers necessary or proper to enable it to carry out fully and effectively all of the purposes of the act, namely, the construction and maintenance of the State Highway System therein created and defined."

There is no doubt that in Missouri persons owning a coal mine may "mine or excavate beneath the surface of any public highway" just so that such operation does not "cause the surface of the ground over which such public highway is constructed to cave in." Section 13613, R. S. Missouri 1929. This was the law in this state even prior to the enactment of the statute. Gamble v. Pettijohn, 116 Mo. 375, 22 S. W. 783.

Therefore, since a person owning land over which a highway passes has the right to take minerals from under the highway, the question arises can the proper authorities allow said owner to temporarily detour the highway at no cost to the public and mine the highway and then restore the same to its original condition.

We call your attention to the case of Town of Clarendon v. Medina Quarry Co., 92 N. Y. S. 530, 102 App. Div. 217, in which exactly the same question as is present in the instant case was before the court.

We will quote at length from this case because of the close similarity of the facts:

> "It cannot be denied that the defendant has a legal right to quarry and take the stone from under the highway. It has the fee to the land within the limits of the highway, and may remove the stone. The public has a legal right to use the land for highway purposes, and this right must not be unnecessarily interfered with by the defendant in quarrying and taking out its stone. So far the parties do not disagree, and no authorities need therefore be cited to sustain the proposition. The only question in dispute is as to the manner in which the quarrying may be done so as to protect defendant's property rights and enable it to remove the stone, and yet not unnecessarily interfere with the public use of the land for highway purposes. The plaintiff's claim is expressed in the terms of the judgment made by the court, but the injunction provided for by such judgment, instead of regulating the doing of the work so as to protect the public rights in the highway, practically prohibits the quarrying of the stone entirely. It provides for a perpetual injunction against any excavation in or obstruction of the highway in any manner, and then permits the quarrying of the stone, provided that, while the work is being done, the highway is maintained open and unobstructed to its full width, and there is no interference with its uninterrupted use for public travel or work or control by the commissioner. It is quite apparent that the quarrying cannot be done without some obstruction and interference with the highway in some part of its width of four rods.

The highway is in the country, is little traveled, and there is no reason why it should be kept open to its full width while the quarrying is going on, or, if bridged, why the bridge should be four rods wide. Much the safer and better way to take care of the travel while the quarrying is being done would be to build a road south of and adjacent to the highway, and use that. The defendant would have to prepare and keep such road in good condition. Very likely the commissioner cannot be compelled to permit such a temporary change in the roads, but if he would do so it would simplify matters very materially. * Provision should also be made for protecting the town against loss growing out of injuries to persons and property by reason of the temporary obstruction and interference with the highway and public travel thereon while the quarrying is being done, and also for its restoration. There should be a bond given for this purpose in sufficient penalty and with adequate sureties. The quarrying should also be completed within a reasonable time after it is begun, so that the obstruction and the interference with the highway and travel thereon may be temporary and in no way permanent. Such temporary interference with highways, even in villages and cities, is frequently permitted, and, indeed, is never refused in the interests of public improvement and private enterprise, and we see no reason why the defendant should not be permitted to quarry the stone under this highway, so as to reap the benefit derived from the sale thereof, and to enable the public to have the use of the stone. Some inconvenience will be suffered by the public, but, making that as small as

> possible and protecting the town from loss, we should permit the quarrying to be done."

In Dean v. Carroll, 143 N. Y. S. 12, the Clarendon case was cited and approved. The facts in that case were the same and we quote from the headnote:

> "The owner of the abutting lands and the fee of a country highway has the right to quarry the stone under it; he constructing and maintaining a good temporary road during the time of removal and thereafter restoring the highway."

However, in Town of Albion v. Ryan, 194 N. Y. S. 261, the rule was modified to the extent that the grant was dependent upon the facts in each case and that if the public were to be unnecessarily or unreasonably inconvenienced, or if the equities in the case were so unequal that permission should be refused. As the court pointed out in the Albion case:

> "The obstruction is neither temporary or unreasonable. The defendants nowhere say how long the interruption of public travel may continue while they are excavating this large amount of sandstone. Very likely it will be for years. It will, therefore, be no trifling task to excavate and remove earth and sandstone covering a space 450 feet long, 4 rods wide, and 30 feet in depth, and to fill up such excavation and restore the surface in a condition for public travel."

The court then cites the Clarendon case, but points out that a good temporary road was built by the mining company and that also "it appeared that the highway was little traveled." The court in closing said:

> "The defendants have a right to tun-

nel beneath the surface and remove their mineral deposit, provided they can do so without interference with the surface of the highway; but if their operations contemplate a long, protracted interference with the surface, the public rights are superior, and until the controverted questions are settled the rights of the defendants must yield, and those of the public be protected."

In view of the above authorities it will be seen that a person owning property abutting a public highway and also the fee in the highway subject to the public easement may mine the minerals under the highway and it is proper and legal for the authorities to grant him permission to build a temporary road around such public highway subject to the condition that the person will restore the highway to its original condition.

As pointed out in the cases, a bond should be required of the company to insure their fulfillment of these conditions, which bond the State Highway Commission has authority to accept. Section 8136, R. S. Missouri 1929.

We now look to the Centennial Road Law, creating the Highway Commission, to determine whether there is anything in that law which changes or forbids the rule laid down above. It must be remembered that this change of the highway is a temporary detour, the cost of which is to be paid, not by the Commission, but by a private individual.

A thorough reading of Article 12, Chapter 42 discloses no statutes which specifically deal with this situation. Section 8110, R. S. Missouri 1929 (Mo. St. Ann. Section 8110, page 6896), which provides that the Commission shall have power to close temporarily for the purpose of construction or repair any portion of a state highway, obviously does not apply in the instant case because the highway will not be closed but shall continue to remain open although a part

will be a detour. Section 8111, R. S. Missouri 1929 (Mo. St. Ann. Section 8111, page 6896), which provides that the Commission shall have power to purchase, lease, or condemn, lands in the name of the state of Missouri for the purpose of "establishing detours in connection with the location, * * reconstruction, widening, improvement or maintenance of any state highway or any part thereof," we believe also does not apply because that section deals only with the situations when the Highway Commission can purchase, lease or condemn lands. Furthermore, we recongize the right of the Commission to relocate roads "when dangerous curves and difficult grades of an earlier location will be eliminated." State ex rel. Highway Commission v. Gordon, 36 S. W. (2d) 105. However, this rule applies only to permanent relocations and not to a temporary change as is requested in this petition. No other section that we can find specifically deals with this situation. Therefore, we must fall back on the general provisions to ascertain whether the State Highway Commission may allow a state highway to be detoured. As our Supreme Court said in State ex rel. St. Louis County v. State Highway Commission, supra, "The highway commission has all powers necessary and proper for the accomplishment of the purposes of the act."

The Legislature saw fit not to confine the powers and activities of the Commission strictly to those enumerated in the statutes as it has done with the Bureau of Building and Loan Supervision (State ex rel. Wagner v. Farm and Home Savings and Loan Association, 90 S. W. (2d) 93), but rather has given it all powers necessary and proper. Section 8134, R. S. Missouri 1929, provides as follows:

> "The state highways as herein designated shall be under the jurisdiction and control of the commission; and the commission shall maintain such roads in a state and manner consistent with the present condition of such roads. Provided, that when the roads included in said state highway

> system have been constructed by the commission, or acquired as provided for herein, they shall be maintained by the commission and kept in a good state of repair at whatever cost may be required. The cost of repairing and maintaining said roads shall be paid out of the state road fund on the warrant of the state auditor, when such payment shall be ordered by the commission. For the purpose of maintaining and repairing such roads, the commission shall have authority to purchase or otherwise acquire, all necessary tools, machinery, supplies and materials, and may employ the necessary labor therefor, and the commission may provide for the proper repair and maintenance of such roads, or any portion thereof, by contract, which shall specify the nature and character of the work to be done. The commission shall also provide for a system of patrol for maintaining and repairing these state highways so that such highways may be effectually and economically preserved and maintained."

As was said in State ex inf. McKittrick v. Missouri Utilities, 96 S. W. (2d) 607:

> "In matters immediately concerned with the construction * * * of the highways and their maintenance the commission has jurisdiction."

Therefore, since the right requested by the petition of the Sinclair Coal Company could be granted and was proper and legal prior to the enactment of the Centennial Road Law, and since there is no statute specifically prohibiting such action, we believe such allowance may be made by the Commission in its discretion. This is in harmony with the rule of construction

as laid down in 59 Corpus Juris, 1038:

> "All statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts; * * A statute will not be given a construction at variance with established rules of law unless the intention to override such rules is clearly manifested."

However, we wish to call your attention again that as pointed out in the cases above, all the facts and equities should be taken into consideration by the Commission before granting any person the right to re-route a highway for the purpose of mining the original section. As in all situations of this kind, the public good is supreme and superior to any private right and the equities should be carefully weighed before permission is given.

CONCLUSION.

It is, therefore, the opinion of this department that the Missouri State Highway Commission may, in its discretion, after taking into consideration all of the facts and equities, grant permission to a coal company to mine a state highway, providing the company posts a bond, builds a proper detour and restores the road

after the work is done, to its original condition.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AO'K:DA

STATE HIGHWAY COMMISSION: Powers to admit utilities to right-of-way.

11/23

November 20, 1940

FILED
86

Honorable Louis V. Stigall
Chief Counsel
State Highway Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of November 19, 1940, in which you inquire whether or not the Stanolind Oil Company has the unqualified right to construct a pipe line along and across public highways under the jurisdiction of the State Highway Commission, which will carry only the product of such company, or whether the State Highway Commission has the discretionary power to admit or exclude said company from the right-of-way.

It is evident that neither public nor private utilities have the right to condemn, under general powers of eminent domain, easements or rights-of-way across land already taken by the State or any of its political subdivisions for a public purpose. This proposition is supported by many decisions in this State, a distinct case being that of the City of St. Louis vs. Moore, 269 Mo. 430, in which we find the following in the Court's opinion at l. c. 436:

> "As regards the first. Can property devoted to a public use, that is more strictly speaking for State purposes, be condemned for other public use, exercised by a municipal corporation? In support of the negative of that question we are cited to the following authorities: Elliott, Roads and Streets, secs. 238, 245; St. L., H. & K. C. Ry. Co. v. Hannibal Depot Co., 125 Mo. 82;

> Edwardsville v. Madison County, 251 Ill. 265, 37 L. R. A. (N. S.) 101; Moline v. Green, 252 Ill. 475; Matter of Utica, 73 Hun (N. Y.), 256; In re Rosebank Ave., 162 App. Div. (N. Y.) 332; McCullough v. Board of Education, 51 Cal. 418; In re Milwaukee Southern R. R., 124 Wis. 490. Those authorities in effect hold that the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the State or property held by a subordinate agency of the State, for the State, as distinguished from other corporations.
>
> "In our opinion these authorities announce the correct doctrine; and if public policy demands a different rule, the remedy is with the Legislature, and not the courts."

This decision was cited with approval in a later case, Cochran v. Wilson, 287 Mo. 210, l. c. 227, where we find the following:

> "* * * This being true, there could have been no condemnation of the property for a public highway, on the ground that it was already devoted to a public use; and, as we held in St. Louis v. Moore, 269 Mo. 430, being already so devoted, it could not for this reason be condemned as a highway. * * *"

It is therefore necessary that any public or private utility obtain permission from the General Assembly, or from some agent properly authorized by it, before being entitled to an absolute right to use the rights-of-way of the highways under the control of the State through the

Highway Commission. We are able to find only two instances where this absolute right has been given by the General Assembly.

Section 4921, R. S. Mo. 1929, gives to telephone and telegraph companies, which are domestic corporations organized under Article 6, Chapter 32 of said statutes, an absolute right in the following language:

> "Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters: Provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

Section 4962, R. S. Mo. 1929, gives to those public utilities, which furnish gas, electricity or water to the public, an absolute right-of-way over the roads of the State, provided, that such companies are organized under Article 7, Chapter 32, R. S. Mo. 1929. That section is as follows:

> "Any corporation formed under the provisions of this article for the purpose of supplying any town, city or village with gas, electricity or water shall have full power to manufacture and sell and to furnish such quantities of gas, electricity or water as may be required by the city, town or village, district or neighborhood where located for public

> or private buildings or for other purposes, and such corporations shall have the power to lay conductors for conveying gas, electricity or water through the streets, alleys and squares of any city, town or village with the consent of the municipal authorities thereof under such reasonable regulations as such authorities may prescribe, and such companies are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters."

These sections apply only to domestic corporations. This view being sustained by State ex rel. v. Western Union Telegraph Company, 165 Mo. 502, l. c. 518, where we find:

> "Ever since 1865 (R. S. 1865, ch. 65, p. 349, sec. 5) there has been a statute in this State authorizing any telegraph company organized under the laws of this State, to place its poles and wires along, over and upon the public highways. But there is not now and never has been any law of this State granting any such franchise or permission to any foreign telegraph company. * * *"

Summarizing, the following have an absolute right to a use of the public highways under the control of the State Highway Commission: (1) domestic telephone companies, (2) domestic telegraph companies, (3) domestic gas companies supplying a portion of the public, (4) domestic electric power companies supplying the public, (5) domestic water companies supplying the public, and none of these may be arbitrarily excluded by the State Highway Commission. This

position has been sustained by State Ex Inf. McKittrick v. Southwestern Bell Telephone Company, 338 Mo. 617, 92 S. W. (2d) 612, with regard to telephone companies, the Court basing its decision on Section 4921, supra, and by State ex rel. Highway Commission v. Kansas City Power and Light Company, 232 Mo. App. 308, 105 S. W. (2d) 1085, and State ex rel. Highway Commission v. Union Electric Company of Missouri, 142 S. W. (2d) 1099, with regard to electric power lines.

In each of the two latter cases the defendant companies had entered into a contract with the State Highway Commission to pay to it an annual rental for the privilege of using the right-of-way. The Court, in each instance, held that the Commission had no authority to collect a fee under a contract since there was no consideration given by the Commission to the defendant companies, because the Legislature had previously granted them an absolute right to the use of the highways. We find in these decisions some very broad statements with regard to the power of the Highway Commission over its rights-of-way, but these are, in each instance, dicta, and, in our opinion, are much too broad to have been made after a specific consideration of the right of the Highway Commission to control utilities other than those just previously mentioned.

An indication of the intention of the Legislature with regard to the use of the county roads of the State by pipe line companies is found in Section 7924, R. S. Mo. 1929, as follows:

> "No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and con-

> duits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court."

This statute gives an absolute right to the county court of any county to permit the erection of pipe lines and power lines along and across county roads.

After the passage of the legislation creating the State Highway Commission, the Legislature discovered that a similar grant of power was necessary to govern construction of pipe lines, or power lines, by utilities along the rights-of-way under control of the State Highway Commission and,to obviate the necessity of the passage of legislation in each particular instance, the Legislature passed Section 8109, R. S. Mo. 1929, as follows:

> "The location and removal of all telephone, telegraph and electric light and power transmission lines, poles, wires, and conduits and all pipe lines and tramways, erected or constructed, or hereafter to be erected or constructed by any corporation, association or persons within the right of way of any state highway, in so far as the public travel and traffic is concerned, and in so far as the same may interfere with the construction or maintenance of any such highway, shall be under the control and supervision of the state highway commission. The commission or some officer selected by the commission shall serve a written notice upon the person or corporation owning or maintaining any such lines, poles, wires, conduits, pipe lines, or tramways, which notice shall contain a plan or chart indicating the places on the right of way at which such lines, poles, wires, conduits, pipe lines or tramways may be maintained. The notice shall also state the time when

the work of hard surfacing said roads is proposed to commence, and shall further state that a hearing shall be had upon the proposed plan of location and matters incidental thereto, giving the place and date of such hearing. Immediately after such hearing the said owner shall be given a notice of the findings and orders of the commission and shall be given a reasonable time thereafter to comply therewith: Provided, however, that the effect of any change ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right of way of the highway. The removal of the same shall be made at the cost and expense of the owners thereof unless otherwise provided by said commission, and in the event of the failure of such owners to remove the same at the time so determined they may be removed by the state highway commission, or under its direction, and the cost thereof collected from such owners, and such owners shall not be liable in any way to any person for the placing and maintaining of such lines, poles, wires, conduits, pipe lines and tramways at the places prescribed by the commission. The commission is authorized in the name of the state of Missouri, to institute and maintain, through the attorney-general, such suits and actions as may be necessary to enforce the provisions of this section. Any corporation, association or the officers or agents of such corporations or associations, or any other person who shall erect or maintain any such lines, poles, wires, conduits, pipe lines or tramways, within the right of way of such roads which are hard surfaced, which are not in accordance with such orders of the commission, shall be deemed guilty of a misdemeanor."

The position that these two statutes are parallel grants of power is sustained by the following quotation from State ex rel. Highway Commission v. Kansas City Power and Light Company, 105 S. W. (2d) 1085, l. c. 1088:

> "The opinion does not hold either directly or inferentially that there is conflict 'in the authority of two separate state agencies.' The authority of county courts and highway engineers is by section 7924 limited to public roads which are not a part of the state highway system. The authority of the state highway commission, in so far as the location of the lines of utilities is concerned, is limited by section 8109 to roads which are a part of the state highway system. There is no conflict in the authority of those agencies."

The first sentence in Section 8109, supra, and those parts relating to pipe lines, reads as follows: "The location and removal of all * * * pipe lines * * * shall be under the control and supervision of the State Highway Commission." The only limitation on this power is found in the proviso in the latter part of this section, which prohibits the Commission from arbitrarily removing such line once it has been established. This prohibition is made in the following language: "* * * Provided, however, that the effect of <u>any change</u> ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right of way of the highway. * * *"

Section 8109, supra, was also considered in the case of State On Inf. of McKittrick, ex rel. City of California v. Missouri Utilities Company, 96 S. W. (2d) 607. In that case respondent, in an action seeking removal of its poles from city streets, set up the defense that such streets were a part of the state highway system and that the poles could be removed only on order of the Commission. The

Court, by way of dictum, stated, at l. c. 614:

> "* * * Orders under section 8109 are limited to those necessary to prevent interference with traffic on the highways and with highway construction. In matters immediately concerned with the construction of paving of the highways and their maintenance, the commission has jurisdiction. * * *"

Although this language and some of the language found in the Kansas City Power and Light Company case and the Union Electric Company case, supra, is purely dictum, it may be construed to indicate an inclination on the part of the courts to limit the extent of power delegated to the Highway Commission under Section 8109, they are meaningless when we stop to consider that the Highway Commission in the first instance could not have obtained any of its rights-of-way unless same were necessary for the construction or maintenance of the public highways, and the true effect of these decisions is to give the Commission absolute power over utilities on the rights-of-way except as qualified by the legislative grants first above set out.

CONCLUSION.

It is, therefore, the conclusion of this Department that the State Highway Commission may admit to its rights-of-way or exclude foreign corporations engaged in the telephone, telegraph, electric power transmission, gas, water, or pipe line businesses, whether public or private, and domestic pipe line or tramway corporations, but cannot exclude domestic telephone, telegraph, electric power and gas or water companies where the latter are public utilities, and said Commission has the right and authority in each and every instance to indicate the places on the right-of-way

where the instrumentalities of all of the foregoing corporations may be located.

It is the further opinion of this Department that, having once permitted location of such instrumentalities along the rights-of-way of the Commission, changes in location may be ordered, but in no case may complete removal of all or any part of such instrumentalities be required by the Commission.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

RLH:CP

SCHOOLS:
NEPOTISM:

Article XIV, Section 13, relating to nepotism, is not violated by the appointment by a school director of a relative within the fourth degree who later marries during her term of employment.

December 3, 1940

1209

FILED
86

Honorable Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Jackson, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated November 28, 1940, which reads as follows:

> "You are requested to furnish the undersigned an opinion relative to the construction to be placed upon Article 14, Sec. 13, relating to Nepotism, based on the following facts.
>
> "One of three school directors voted affirmatively with one other school director for the reemployment of a school teacher in April, 1940, at a time when the school teacher was reported to be unmarried and not contemplating marriage. Soon after her election and prior to the beginning of the school year in September, and prior to signed acceptance of the contract she married the nephew of the school director who had voted for her employment, and has been employed and compensated each month since that time.
>
> "The question presented is whether the school director mentioned thereby forfeited his office, although no proof is available that he knew

> that the wedding would actually take place although there is sufficient evidence to prove that he had reasonable notice that a marriage would take place.
>
> "The second question presented is whether the contract of employment is valid and the school directors obligated to pay the warrants under her contract."

Article XIV, Section 13, Constitution of Missouri, page 157, reads as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The above section has been construed as self-enforcing.

In the case of State v. Ellis, 28 S. W. (2d) 363, l. c. 365, the court said:

> "The opinion, however, seems to put the conclusion squarely upon the theory that the constitutional provision itself was not self-enforcing. That is contrary to the general rule, as mentioned above and as announced in this state in a later case, State ex inf. v. Duncan, 265 Mo. 26, loc. cit. 42, et seq., 175 S. W. 940, Ann. Cas. 1916D, 1, and in cases cited there. It was there said, loc. cit. 42, of 265

Mo., 175 S. W. 940, 944, in relation to section 9, article 9: 'Indeed, the clause under discussion merely expresses a status which will instantly result from the election required to be held. Statutory language would be impotent to add aught to the Constitution's expression of this resulting status, and so the clause is self-executing. It is a provision complete in itself, and needs no legislation to put it in force.' That language aptly applies to this case.

"Section 13 provides that any official violating its provision, '* * * shall thereby forfeit his * * * office employment.'

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477.

"The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from Corpus Juris above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.' That was clear in the debates.

"No doubt that idea was prominent in the minds of the voters who adopted

it. As a matter of common knowledge it was so agitated in the newspapers."

Section 9209, R. S. Missouri 1929, relates to the procedure of the employment of teachers. This section was amended in the Session Laws of 1933, page 387, and the Session Laws of 1933, page 387, were amended and a new section enacted in lieu thereof by the Session Laws of 1939, page 695, and given the section number of 9209. Section 9209 of the Session Laws of 1939, page 695, reads as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teachers's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. All

> transactions of the board under this section must be recorded by and filed with the district clerk. Provided, that the board of education of any first class high school may employ a superintendent either before or after the annual school election."

It will be noticed in the above section that the following appears:

> "* * * nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. * * "

The above phrase relates to the acceptance of the application of the teacher and does not refer to the contract entered into later on at a general or special meeting of the school directors between the teacher and the board of school directors.

In your request you state that two directors voted affirmatively for the reemployment of the school teacher in question in April, 1940, and at that time this teacher was unmarried but later married the nephew of the school director who had voted for her employment. This act of the two school directors was not a violation of Article XIV, Section 13 for the reason that at that time the teacher was not a relative of either of the school directors within the fourth degree, either by consanguinity or affinity.

You also state in your request that after her application as a school teacher she married the nephew of the school director who had voted for her employment and that after the marriage she signed the formal contract tendered her by the board of school directors. I am assuming that at the time the formal contract was authorized that all three members of the board of directors were present and if so, if the contract was

authorized on the vote of two members of the board of directors who were not related to the school teacher, the contract without question would be valid even though one of the directors was related to the school teacher within the fourth degree. Unless the relative of the school teacher, as a director, fraudulently connived with the other two members of the board of school directors, this appointment would be valid. It was so held in State v. Becker, 81 S. W. (2d) 948, l. c. 951, where the court said:

> "Now, in the instant proceeding, it is freely conceded that in the intended appointment there is not in fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose. The sum of the matter is that Judges Becker and McCullen are about, honestly and in good faith, to exercise their official power in securing for the Court of Appeals the continued and uninterrupted services of a commissioner whose record of integrity of character, untiring industry, and distinguished judicial service, has met with the unqualified approval alike of his associates on the Court of Appeals and the bench and bar of the state.
>
> "In view of the foregoing considerations, we are of the opinion that the threatened action of the respondents is not beyond or in excess of their jurisdiction as members of the St. Louis Court of Appeals and is not in violation of section 13 of article 14 of our State Constitution."

The state law does not prohibit the employment of married women and have even gone so far as to hold that a prohibition in the contract between the board of directors and the teacher which would declare the contract void in case of marriage during its term was against public policy and absolutely of no effect. It was so held in the case of Taggart v. School District #52, Carroll County, 96 S. W. (2d) 335, 339 Mo. 223, which reversed 88 S. W. (2d) 447. It has been held in this state in regard to contracts entered into by school teachers with the board of school directors take effect after the application of the teacher has been passed upon favorably by the board of directors and does not depend upon the later formal signing of the contract of employment. It has also been held in this state that where a school teacher formally makes application for employment as a school teacher and her application has been passed upon favorably and her employment accepted, if the board of directors should then fail to send her the formal contract of employment and employ another teacher they would be liable for damages for a breach of contract. In the case of Bailey v. Jamestown School Dist. No. 11, 77 S. W. (2d) 1017, l. c. 1020, par. 4, the court said:

> "A contract is the agreement which the parties made and not the writing which evidences the agreement. Edwards v. School District, 221 Mo. App. 47, 297 S. W. 1001, 1002."

In the above case a school teacher filed her application for reemployment and it was accepted and placed upon the minutes of the meeting of the board of directors. Later they employed another teacher and at no time did they send the formal contract of employment to the school teacher. The court held that the contract of employment was consummated at the time of acceptance of the application of the teacher for reemployment which is the same facts as set out in your request except under the facts in your request the contract of employment was signed after her marriage. In the above case it specifically held that the formal contract was only evidence of the original contract of employment. In the case of Edwards v. School Dist. No. 73, 297 S. W. 1001, l. c. 1002, par.

3, the court said:

> "A contract is the agreement which the parties make and not the writing which evidences the agreement. 13 C. J. 239. In Baxter v. School District, 217 Mo. App. 389, 266 S. W. 760, we held a teacher's contract valid, although the president of the board had not signed a formal written paper evidencing the contract.
>
> "Plaintiff in the cause at bar filed her written application, duly signed by her. It specified as to the school, term, salary, etc. This application may be termed an offer, and the board of directors not only made an order accepting this offer, but went further, and each director, including the president, signed a writing which evidenced the contract which they had consummated by their acceptance of record. It also appears that the clerk of the district signed the minutes of the board accepting plaintiff's application to teach the school. This record shows that every requirement as to writing and signing, made by section 11137, was fully met. There is no argument against the validity of the contract except that it was not formally written upon a separate paper and there signed by all the parties required by the statute. Such is not necessary and could not be made so without making the law respecting teachers' contracts different from the general law of contracts. We hold that plaintiff's contract was valid and binding."

Under the above two preceding cases there is no

question but that the contract is consummated at the time the board of school directors accept the application of the teacher for employment. Under the facts in your request the contract was consummated at the time one of three school directors voted affirmatively with one of the other school directors for the reemployment of the school teacher in April, 1940, at which time she was unmarried.

In the case of State v. Whittle, 63 S. W. (2d) 100, l. c. 101, the court said:

> "Original proceeding in this court. Information in the nature of quo warranto. In substance it is alleged that, at a lawful meeting of the board of directors of a common school district in Miller county, Logan Stone was by said board employed and contracted with as teacher of the school in said district; that Stone is a first cousin by affinity of respondent Otto Whittle, a director of said district; that he was so employed by said board as the result of respondent Whittle and another director of the district voting in favor of him for the position; that the other director of said district voted against the employment of Stone to teach the school; that respondent Whittle, by voting to employ Stone as teacher, violated section 13, art. 14, of the Constitution, and thereby forfeited his office as director of the school district. The case was submitted on respondent Whittle's demurrer to the information.
>
> * * * * * * * * * * *
>
> "Even so, respondent contends that said provision of the Constitution

is not directed against school directors who participate as such in naming a teacher. He argues that a director is without authority in the matter, citing section 9209, R. S. 1929 (Mo. St. Ann. section 9209), which provides that the board shall have power, at a lawful meeting, to contract with and employ a teacher by order of record.

"Of course, there must be a substantial compliance with the statute. Otherwise the teacher is not employed. It follows that, as between the district and the teacher, the power to employ is lodged with the board. However, as between the public and a director, 'the right to name or appoint' a teacher is not determined by reference to the statute. To hold that said 'right' is so determined would convict the people of intending to eradicate only a small part of the evil. Furthermore, to so hold would be absurd. Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates

> the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

Under the holding in the above case the school director who had violated Section 13 of Article XIV of the Constitution sought to enter the defense that he did not personally contract for the employment of his first cousin, but that the board of directors, by authority of Section 9209, R. S. Missouri 1929, which is now Section 9209, Session Laws of 1939, employed the teacher. It also specifically stated that the violation of Section 13, Article XIV was committed when the appointment was made and not when the formal contract was entered into.

CONCLUSION

In view of the above authorities it is the opinion of this department that a school director who, upon application of a school teacher, appoints the teacher who later marries the nephew of the school director joining in the voting for the appointment has not violated Section 13, Article XIV of the Constitution of Missouri.

It is further the opinion of this department that where the school teacher has made application and has been accepted and appointed before marriage but marries a relative within the fourth degree of the school director voting for his or her appointment before signing the formal contract of employment, the contract of employment is valid and the school directors are obligated to pay warrants under her contract for the full term of her employment.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

TAXATION:
MUNICIPALITIES:
CITY HOSPITAL PROPERTY:
EXEMPTION:

Property donated to or owned by city of the third class for a city hospital is exempt from taxation.

April 25, 1940

5-1

FILED
88

Mr. H. Tiffin Teters
City Attorney
Bank of Carthage Building
Carthage, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not the McCune-Brooks Hospital is liable for taxes on the properties of that institution.

In your request and statement of facts you set out the contents of an opinion written by this department on October 10, 1938, to Mr. Coyne, Prosecuting Attorney of Jasper County, Missouri, and written by Mr. Wm. Orr Sawyers, Assistant Attorney General. That opinion held that the properties which were held by the City of Carthage for the use and benefit of the McCune-Brooks Hospital were liable for taxes. This was based on the ruling announced in St. Louis v. Wenneker, 145 Mo. 230. The opinion in the Wenneker case was arrived at on the theory that the city was merely a trustee and was not the beneficial owner of the properties over which it was trustee. The opinion also held that the title to the property in issue is no legal reason to claim that this city hospital property be exempt from taxation as city property is exempt because the title is not held by the City of Carthage for the use of the City of Carthage.

In your request you set out a further statement which would indicate that the McCune-Brooks Hospital does belong to the City of Carthage, and since the writer of the foregoing opinion was not familiar with that fact, you request this opinion. In your request you set out the facts pertaining to the ownership of the hospital as follows:

"The McCune-Brooks Hospital is owned and operated by the City of Carthage, all moneys and all revenue passing through the offices of the Treasurer and City Clerk. In other words, McCune-Brooks Hospital is merely a department or board set up under the statutes relating to cities of the third class for the organization of hospitals.

"In giving a brief history of the organization of the hospital, the Carthage Hospital Association was incorporated by a pro forma decree of the Circuit Court in Jasper County at the March term, 1893, on April 28, 1893. This corporation operated a hospital for some years as a private corporation. At the June term, 1928, the Circuit Court of Jasper County, Missouri, at Carthage, dissolved the Carthage Hospital Association. This corporation turned all of its property and all of its assets over to the City of Carthage.

"By Ordinance No. 1477 of the City of Carthage, Jasper County, Missouri, passed and approved on the 28th day of May, 1928, the McCune-Brooks Hospital was organized as a municipal hospital governed by a board of six trustees appointed by the Mayor, said trustees serving without any compensation. It provides for the collection of special taxes for the support and maintenance of the hospital.

"Bonds totaling $75,000.00 were approved and issued under a bond election held in the City of Carthage on April 3, 1928, and a new hospital building was erected. These bonds are now being retired by the City of Carthage.

"In regard to the specific question in this case, different donors have left to the City of Carthage property for the support and maintenance of the hospital. Income from this property goes to pay the hospital expenses of pauper patients, particularly those within the City of Carthage and those which the county refuses to pay or make any allowance for and for patients from outside the city but who live in Jasper County and who are really pauper patients but who are not attended by the county physician. Until this letter was written in 1938, taxes were not collected on this property or were not even assessed.

"Quoting from the above opinion which states, 'We are of the opinion that the only city property intended in Missouri as tax exempt was such property held by a municipal corporation for the use of the municipal corporation,' we feel that we come within this classification as the City of Carthage holds title to the property for a branch or a part of the municipal corporation. McCune-Brooks Hospital and the City of Carthage are one and the same as the hospital is under the complete control of the Mayor and City Council of the City of Carthage."

In the former opinion this department stated, "We are of the opinion that the only city property intended in Missouri as tax exempt was such property held by a municipal corporation for the use of the municipal corporation." Therefore, the conclusion on this opinion will depend upon whether or not the McCune-Brooks Hospital is city-owned by the City of Carthage.

As stated in your request, the City of Carthage is a city of the third class and its powers and duties, in reference to owning and operating hospitals, are set out in Article 4, chapter 38, R. S. Missouri 1929. Section 6719 of said Article and chapter authorizes such city "* * * to purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire; may receive bequests, gifts and donations of all kinds of property; * * * * * * * * " In the case of Kennedy v. City of Nevada, 281 S. W. at 56, it was held that a city of the third class may purchase real estate only for municipal purposes. However, this case does not hold that such a city may not receive bequests, gifts and donations which are not particularly needed for municipal purposes.

Section 6807 of said Article and chapter authorizes the council of such city to obtain lands necessary for hospital purposes. Section 6834 authorizes such city to provide for the purchase and maintenance of hospital buildings, etc., either by taxation or by the issuance of bonds. So it will be seen by the foregoing provisions of said Article and chapter that cities of the third class are permitted to establish, operate and maintain city hospitals and to receive bequests, gifts and donations of all kinds of property for that purpose. In connection with the power of a city of the third class to receive donations we find in the case of Kennedy v. City of Nevada, 281 S. W. 56, 59, such power of a city is stated as follows:

> "We do not say that the Legislature has no power to authorize cities of the third class to acquire and hold property for other than strictly municipal purposes. It has been held that, even under the common law, land may be given or devised to the city, or the city may obtain title by adverse possession, and the city may lawfully acquire title thereto, although the land may not be wanted for municipal purposes; yet the city may acquire it for the reason that it may be applied by

> sale or lease to the alleviation of municipal burdens (New Shoreham v. Ball, 14 R. I. 566), and there is no doubt but that section 8206, R. S. 1919, gives authority to cities of the third class to 'receive bequests, gifts, and donations of all kinds of property.'"

Your letter indicates that certain parties have donated lands for the use and benefit of this hospital. The liability for the taxes on these lands which are not particularly used for the hospital grounds is the question which we understand is at issue. Your request does not state whether or not these lands were conveyed to the hospital before it was taken over by the city. However, we think that that would be immaterial if the city now owns the fee simple title to these lands for the use and benefit of the hospital.

Section 6 of Article X of the Constitution of Missouri provides in part as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. *"

Section 9743, R. S. Missouri 1929, provides in part as follows:

> "The following subjects are exempt from taxation: * * * * * * * * * * fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, or ornament; * * * * * * * * * * "

Section 7 of Article X of the Constitution of

Missouri provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

It will be noted that the foregoing exemption provisions of the Constitution and of the statute are directed solely to "ownership" of the property. In this connection we find that the general rule is stated that where tax exemption provisions are directed solely to "ownership" of public property, the use to which such property is put becomes immaterial. This rule is announced in Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S. W. (2d) 151. So following the foregoing rule, if the city owns this property, then regardless of the fact of whether or not it is used for hospital purposes it would be exempt from taxation.

We have in mind another rule which would be applicable in this case and that is, "When public property is involved, exemption is the rule and taxation the exception." This rule is announced, approved and followed in the Drainage District case, supra.

In 3 A. L. R. at 1440, the rule of unqualified exemption of publicly owned property is stated as follows:

> "Property owned by the state or subordinate municipal bodies is expressly exempted from taxation by constitutional provision or statutory enactment in many jurisdictions, and in some of these jurisdictions it is held that, where the exemption is express and unqualified, no tax can be levied against it regardless of the use to which it is put."

We think the provisions of the Constitution of Missouri and the statute hereinabove cited make the foregoing rule applicable to Missouri.

In order for property of a municipality to be exempt from taxation it is not necessary that it be used for municipal purposes. Referring to the latter part of the constitutional provision and the statute hereinbefore referred to, it will be seen that in order for properties of religious or charitable organizations to be exempt they must be used exclusively for those purposes, but this rule does not apply to municipal properties. That being the case, if the City of Carthage owns these lands which are given for the use and benefit of the hospital and the hospital belongs to the City of Carthage, then regardless of what use the lands are put to they would be exempt from taxation.

We further call your attention to the statement made in 101 A. L. R., page 790, in which the rule was announced as follows:

> "The fact that land of a containing basin to store surplus water in flood times is cultivated when not overflowed, giving some revenue to the drainage district, does not make the land subject to taxation. State ex rel. Kinder v. Little River Drainage Dist. (1921) 291 Mo. 267, 236 S. W. 848."

In connection with this request, I am enclosing a copy of a memorandum written by Mr. O'Keefe, Assistant Attorney General, on the question of taxation by the City of St. Louis of property held by the Babler Trust Fund. The facts and circumstances in connection with this trust fund are somewhat analogous to your hospital case and I think will support our views in this opinion.

We do not have before us the conveyances whereby these properties were conveyed to the hospital, but if the City of Carthage is now the owner of the hospital and all of its properties, then our conclusions are all of the properties are exempt from taxes.

CONCLUSION.

From the foregoing it is the opinion of this department that the lands and other property which are held by the City of Carthage for the use and benefit of McCune-Brooks Hospital which belongs to the City of Carthage are exempt from taxation under the foregoing provisions of the Constitution and section of the statute.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

COUNTIES: REDUCTION OF COUNTY TREASURER'S SALARY: County Court has right to reduce treasurer's salary.

January 20, 1940 1-23

FILED 90

Mr. E. S. Trantham, Treasurer
Webster County
Marshfield, Missouri

Dear Sir:

We are in receipt of your letter of January 18th wherein you request an opinion, which reads as follows:

> "I would like an opinion on the following situation.
>
> On November 23, 1938, the county court made an order and recorded same in the minutes of meeting. Setting salary of county treasurer at $1800.00 per year. Effective Jan. 1, 1939.
>
> On January 10, 1939, the county court made an order recorded in minutes as follows.
>
> The court orders that effective Jan. 1, 1939, the treasurer's salary be and is fixed at $1500.00 per year. Did the later court have legal power to change the order of Nov. 23, 1938. After the treasurer had taken office?
>
> Which order is legal and binding on said court."

We find that on December 19, 1939, our department rendered you an opinion regarding the same general situation, and this request is on a specific set of facts.

In addition to the opinion which is referred to above, we call your attention to the case of Dietrich v. Brickey, County Court Judge, 48 S. W. (2d) 69, wherein the court said:

> "This is an action to set aside and enjoin the enforcement of an order made by the defendants, as judges of the county court of Jefferson county, reducing plaintiff's salary from $1,500 to $1,000 per annum, as treasurer of said county. The trial resulted in a judgment for defendants, dismissing plaintiff's bill, and plaintiff appeals.
>
> For the previous history of the case see Dietrick v. Brickey (Mo. App.) 277 S. W. 615; State ex rel. Dietrich v. Daues, 315 Mo. 701, 287 S. W. 430; Dietrich v. Brickey (Mo. App.) 293 S. W. 65; Id., 327 Mo. 189, 37 S. W. (2d) 428.
>
> Plaintiff concedes the power of the county court, in the exercise of an honest discretion, to reduce his salary, but insists that the weight of the evidence shows that the order of the county court reducing his salary was made arbitrarily, corruptly, and fraudulently, and not in the exercise of an honest discretion, and asks that this court reverse the judgment of the circuit court and direct that court to set aside the order of the county court and enjoin its enforcement.
>
> The order of the county court was made on December 18, 1923. Previous to that time, during plaintiff's incumbency, his salary had been increased from $1,000 to $1,500. * * * * * * * * *"

And further, the court said upon the state of facts:

> "We cannot say, in view of this evidence, that the order of the county court was made arbitrarily, corruptly, or fraudulently, or that there was an abuse of discretion in making the order."

In conclusion, we are of the opinion that the county court of Webster County had the legal right to make the order on January 10, 1939, reducing the salary of the county treasurer from $1800.00, as was made on its record November 23, 1938, to the sum of $1500.00.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

BRC:VC
Enc.

ELECTIONS:
VOTERS: Residence -
Qualifications -
STUDENTS:

wnether or not students may vote, depends upon facts and circumstances of each particular voter.

10-24

October 24, 1940

FILED
90

Mr. J. W. Tucker
Secretary of State's Office
Room 114
Jefferson City, Missouri

Dear Sir:

In reply to your request on the question of whether or not students attending Park College, who possess other qualifications besides their residence as voters, may vote in the general election, I find that this question has been thoroughly covered by the Kansas City Court of Appeals in the case of Goben v. Murrell, 195 Mo. App. 104.

In this case, which was an election contest, the contestant contended that certain students of the School of Osteopathy had voted for his opponent and that they were not legal voters because they had not resided in the City more than sixty days prior to the City election. In this State a person must reside within the State one year, and sixty days in the County, before the election, in order to be permitted to vote.

In the Murrell case the facts as to the students' status as residents are similar to the facts that generally come up on this question. In that case the facts upon which the court found that the students were not permitted to vote were:

They had left their place of residence and had come to Kirksville for the sole purpose of becoming students at that institution of learning; they intended to remain in the school for three years and locate elsewhere for the practice of their profession; they never had altered their intentions of leaving Kirksville as soon as the course of study had been completed. In other

words, the facts showed that they were there for the temporary purpose of obtaining an education, and when that was completed they intended to locate elsewhere.

As stated above, when such conditions exist, the student is not a resident which would authorize him to vote in that election. In such cases the student should make application for an absentee ballot to vote at his home precinct or where he actually resides.

In the Murrell case, at l. c. 108, the court said:

> "* * * Residence must have some connection or identification with the community. One's stay should at least be indefinite and not, as shown here, for the mere temporary purpose of attending school and then immediately leaving to locate in a permanent home elsewhere."

Again, at l. c. 109, the court said:

> "Under our election law a student neither loses his old residence nor gains a new one during his absence from the former, or presence at the latter. It is true that this law does not preclude his becoming a resident and voter at the school town or city, but his intention must be evidenced by something more than his mere physical stay in the place. He must intend to make it his home--not that he shall remain for life--but his home indefinitely. And so if he comes into the place for the temporary purpose of getting an education and then to leave for other parts, he has not such a residence as entitled him to vote. * * *"

Again, at l. c. 110, the court said:

> "* * * Would one suppose that mere students are eligible to the offices at the locality of the school? There are municipalities in which schools are located, where the students outnumber the citizens proper. It certainly would strike one as extraordinary to learn that it was in the power of these nontaxpaying sojourners to wrest the city or county government from the voice and hand of the permanent citizens."

The question of residence always depends on facts, circumstances, conditions and intentions. Seldom will these be alike in two different cases. In case of doubt, or, in all cases, the judges of election have a right to inquire into the case and ascertain the facts and qualifications of the applicant for the ballot.

CONCLUSION.

It is, therefore, the opinion of this Department that if the facts show that a student comes to Park College merely for the purpose of obtaining his education, and not with the intention of residing in that County, then such person would not be considered a resident and qualified to vote there.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

TWB:CP

COUNTY TREASURER: Term expires on April 1 in counties under township organization.

December 17, 1940

12-30 FILED 92

Honorable C. G. Vogt
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated November 18, 1940, as follows:

> "Will you please give me as soon as possible your opinion as to when the treasurer elect, 1940, takes office in Nodaway County. Nodaway County is under 40,000 population and under township organization."

In considering this question, the history of the legislation governing the office of county treasurer in counties under township organization should be briefly considered. For more than fifty years the statutes have provided that treasurers, in counties with township organization, should take office on the first day of April in the year following their election and should hold office for a term of four years. Section 12130 R. S. Missouri 1929, is as follows:

> "On the Tuesday after the first Monday in November, 1912, and every four years thereafter, there shall be elected by the qualified voters of the several counties in this state a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office

> for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted, or that may hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

This statute survived unchanged all terms of the Legislature since its enactment in 1885. It was amended by the Session Laws of 1933 at page 338, as follows:

> "Sec. 12130. Election of treasurer--term of office.--On the Tuesday after the first Monday in November, 1936, and every four years thereafter, there shall be elected by the qualified voters in all counties of this state now or hereafter having a population of 40,000 or more inhabitants according to the last decennial United States census, and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

Under this amendment a county treasurer, where a township organization existed, would have assumed office April 1, 1937, and his term would have expired April 1, 1941. In 1937 the Legislature repealed Section 12130, as it existed in 1933, and enacted Section 12130c, found in Laws of 1937 at page 426, which is as follows:

> "On the Tuesday after the first Monday in November, 1940, and every four (4) years thereafter, there shall be elected by the qualified voters in all counties of this State, now or hereafter having a population of 40,000 or more inhabitants according to the last Decennial United States Census, (except in counties having 75,000 and not more than 90,000 inhabitants) and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor. Provided further, that the present county treasurers shall remain in office until their successors are elected or appointed and qualified, unless sooner removed from office."

An examination of the provisos in each of the above sections pertaining to the office of treasurer under township organization discloses that those clauses providing that the term of office of such treasurer shall expire April 1 in the year following the election of a successor are identical. The reason for this exception in the case of treasurers under township organization may be found in Sections 12313 and 12323, R. S. Missouri 1929. The first of these provides that the county treasurer in counties having adopted township organization and who is ex-officio collector of such county shall make a full and complete settlement of all his accounts with the county court at a meeting to be held on the first Monday in March of each year. The latter section provides that the township collectors of the various townships shall also make settlements with the county court on the same date and shall at that time pay over to the county treasurer and ex-officio collector all money remaining in their hands collected on state and county taxes, and shall at the same time make a return of all delinquent or unpaid taxes. For these reasons the Legislature has fixed the term of the county treasurer and ex-officio collector to coincide with these annual settlements, the settlement having been completed in March, the new officer may enter upon his duties on the first day of April with a "clean slate." To permit the new officer to assume his duties on the first day of January would compel him to prepare a complete annual settlement within the next two months and doubtless result in considerable confusion.

The construction to be given statutes in this state is fixed by Section 655, R. S. Missouri 1929, which is in part as follows:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases

> having a peculiar and appropriate meaning in law shall be understood according to their technical import;
> * * * * * * * * * * * * * * * * * * * "

By the adoption of the identical language used in former statutes ending a term of county treasurers on April 1, we may assume that the Legislature intended to be consistent in order to make the terms of such treasurers uniform. Section 5, Article XIV of the Constitution of Missouri provides as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

We must assume that the Legislature had knowledge of the fact that a county treasurer elected in 1936 would, under Section 12130, enacted in 1933, hold office until April 1, 1941. In view of the above constitutional provision the Legislature would have doubtlessly terminated the office of such treasurer in specific language and they failed to do so.

CONCLUSION

It is, therefore, the conclusion of this department that a county treasurer, in a county having adopted township organization elected at the general election in November of 1936, is entitled to hold office until April 1, 1941, and until his successor is elected, qualified and commissioned.

Respectfully submitted

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

RLH:DA

CHATTEL MORTGAGES: The meaning of the term "their distributing
MOTOR VEHICLES: dealers" as used in Section 3097A, Laws
of Missouri 1939, page 278.

January 27, 1940

1-30

FILED
93

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department based on the following statement of facts:

> "This office would appreciate an opinion on certain points in respect to Section 3097A, page 278, Laws of 1939. The proviso of the section reads as follows:
>
> "'Provided, however, that the provision of this section shall not apply to chattel mortgages given to secure the purchase price of a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles.'
>
> "It is not clear to us just what is intended by the words 'manufacturer or their distributing dealers'. 'Dealer' as defined by Webster is 'one who divides, distributes, or delivers.' The word 'distributing' as used in this proviso leaves some doubt as to what class of dealer it refers.
>
> "We are unable to determine whether this clause applies solely to pur-

chase money chattel mortgages on cars sold by manufacturers or their franchised dealers or whether it applies to sales made by all licensed dealers. For illustration, a Ford dealer holding a franchise from the Ford Motor Car Company sells a used Ford automobile and accepts a chattel mortgage in part payment thereof. Should the mortgage in such a case be certified to on the certificate of title or is such a purchase money mortgage exempt from the provisions of the law? In another case, if the same Ford dealer should sell a used International truck and take a chattel mortgage in part payment of the purchase price, should this mortgage be certified to on the certificate of title or is such a purchase money mortgage exempt from the provisions of Section 3097A?

"Many automobile dealers buy and sell automobiles but do not hold a franchise from any automobile manufacturer. Such dealers handle used cars exclusively. If a dealer in this classification sells an automobile and accepts a chattel mortgage in part payment of the purchase price, should such a mortgage be certified to on the certificate of title or is the mortgage exempt from the provisions of this law?"

In our research on this question we find that this department, on September 1, 1939, by an opinion to Mr. Roy Coyne, Prosecuting Attorney of Jasper County, written by the undersigned, treated the subject on the foregoing proviso in Section 3097A, Laws of Missouri 1939, page 278. However, I note that that part of the

proviso which referred to "their distributing dealers" was not passed upon in that opinion. I am enclosing a copy of that opinion with this opinion for your information.

Since the proviso is quoted in your request, I will not again include it in this opinion but will refer to it as in your request.

It is a general rule of construction of statutes that the words should be taken in their ordinary meaning unless there is some indication in the act that they should have a special meaning.

Under Section 7759, R. S. Missouri 1929, in the Motor Vehicle Act the term "dealer" is defined as "Any person, firm, corporation, association, agent or sub-agent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers." As stated in your request, the term "distributing" when used in connection with the word "dealers" leaves some doubt as to what class of dealers is referred to in the foregoing act. It will also be noted that this proviso excludes from the provisions of the act the manufacturers or their distributing dealers. So, it would seem that in order for a distributing dealer to be exempt from the provisions of the act that he must be a dealer who is distributing motor vehicles for some manufacturer. However, we think the term is broad enough to authorize such distributing dealer who also sells and deals in used cars, to be within the exempted class insofar as the provisions of the foregoing Section 3097A apply.

Answering some of your questions directly in which you ask: "For illustration, a Ford dealer holding a franchise from the Ford Motor Car Company sells a used Ford automobile and accepts a chattel mortgage in part payment thereof. Should the mortgage in such a case be certified to on the certificate of title or is such a purchase money mortgage exempt from the provisions of the law?" In answer to this question and follow-

ing the foregoing statement, we would say that such a transaction would be exempt from the provisions of the law. The same rule is applicable if such dealer is distributing for a manufacturer.

CONCLUSION.

From the foregoing it is the opinion of this department that the term "their distributing dealers" as used in Section 3097A, Laws of Missouri 1939, page 278, applies to all dealers who are authorized dealers of a manufacturer of automobiles.

We are further of the opinion that distributing dealers of manufacturers are not within the provisions of the foregoing law and are not required to have mortgages certified, as is required by the Act, on motor vehicles upon which such mortgage is given.

We are also of the opinion that a person who deals in automobiles, but is not a dealer for a manufacturer or is not an authorized dealer, is within the provisions of the act requiring mortgages given to him to be certified.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

ELECTIONS: TOWNSHIP COMMITTEEMEN AND COMMITTEEWOMEN
Primary : elected in August Primary hold office until following August Primary, although township should be divided between both primaries.

February 9, 1940

2-10

FILED
93

Hon. Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated February 1, 1940, which reads as follows:

> "Recently the County Court of St. Louis County entered an order dividing Carondelet Township of this County into two townships, the Lemay Township and the Gravois Township.
>
> "We have been requested on behalf of the Republican Committeewoman of Carondelet Township, duly elected at the August Election, 1938, to secure an opinion on the question of whether the division of Carondelet Township automatically makes her Committeewoman of Lemay Township, in which she resides, without re-appointment by the Central Committee and issuance of a new commission by the Governor.
>
> "Also, a ruling is requested as to whether the additional Committeemen and Committeewomen to be, for the two new townships created, must receive the recommendation from their Central Committee

and receive their commission from the Governor, or whether this action can be taken solely by the Committee without reference to the Governor.

"In short, an opinion is requested regarding the status of the former Committeeman and Committeewoman of Carondelet Township and the manner of appointing new Committeemen and Commiteewomen for the two new townships."

Section 10278 R. S. Missouri, 1929, reads as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257, R. S. 1929."

Under the above section the county committeemen, which includes the county committeewomen, are elected and are not nominated. It specifically holds that at the August Primary the committeemen or committeewomen shall be elected. This election of course takes place before the regular election in November.

Township committmen have been held to be public officers. It was so held in State v. Hamilton, 240 S. W. 445, l.c. 447, where the court said:

> "Cases illustrative of the effect of a nomination by a primary election are not necessary to the determination of the official status of a party committeeman. He is not nominated but elected at the primary, and his election at that time and in that manner is as effectual as if he had been chosen at a general election. It is therefore from the nature of the duties the law imposes on him that the character of his position is to be determined. We have shown that the law defines the duties and that their performance involves the discharge of certain functions of government. This, without more, is sufficient to authorize the classification of such a committeeman, if not as a public officer in the full sense of the term, as holding a position analogous thereto."

Section 12041 R. S. Missouri, 1929, reads as follows:

> "Each county court may divide the county into convenient townships, and as occasion may require erect new town-

> ships, sub-divide townships already established, organize better township lines, and may, upon the petition in writing, of not less than twenty-five per centum of the legally qualified voters of each township affected, as such vote was cast in the last preceding general election for the office receiving the greatest number of votes in the township or townships affected, consolidate two or more existing townships, into one township, or otherwise reduce the number of townships, or change the boundary lines thereof, as may be deemed advisable."

This section provides for the division of townships and also provides for the consolidation of townships.

Under Section 10278, supra, the only qualification set out is that the candidate, either a man or a woman, should be a qualified elector of the district or the precinct, as the case may be, to act as committeeman or committeewoman for such township.

In your request you state that the county court has divided a certain named township into two other separate townships under different names. Since Section 10278, supra, provides that the election of the township committeemen or committeewoman should be held in the August primary there can be no other election for committeemen or committeewomen for the two new townships designated by the county court in place of the old township, under which the committeemen and committeewomen were elected in 1938.

Since neither of the committeemen or committeewomen have resigned or are incapacitated by removal or other causes they are still officers of the old township for the reason that the election for committeemen and committeewomen under the new divided townships cannot take place

until the August primary in 1940. There has been no vacancy in any of the offices and all of the committeemen and committeewomen elected in 1938 hold office until the new committeemen and committeewomen are elected in the new townships, in 1940.

It cannot be said that a vacancy has arisen by reason of the change of the name of the original township, for the reason that they are not removed out of the township by reason of the changing and division of the original township. This question has not been passed upon by our courts, but in the case of Stewart v. Riverside, 68 N. J. Law 571, l. c. 573, the court said:

> "Section 8 seems to cover the entire subject, and to exclude the creation of a vacancy by implication from circumstances not covered by that section. In our opinion a removal out of the township, in order to create a vacancy, must be a voluntary removal. A removal by operation of law, resulting from an act of the legislature cutting off a portion of the township, leaving a person out of the township who, when elected, was a resident within its territory, would not be a 'removal out of the township,' within the meaning of section 8 of the act. The words, 'become incapable of serving' refer, as we think, to a personal incapacity, mental or physical, on the part of the incumbent, and not to a supposed incapacity created by a change of the township boundary, leaving the incumbent a non-resident of the township. Non-residence renders one ineligible to the office, but no incapable of serving."

Also, in 63 C. J. page 139, this authority states as follows:

> "* * * In some cases it has been held that a change of boundaries which leaves the residence of the officer outside the township will operate to vacate his office at least prima facie; but under a statute concerning townships which provides that, 'if any person shall resign from his office, or shall die or remove out of the township, or become incapable of serving, 'etc., his office shall be deemed to be vacant, the 'removal out of the township' contemplated is a voluntary removal. And a removal by operation of law resulting from an act of the legislature cutting off a portion of the township, including the place of residence of a township officer, who, when elected, was a resident within its territory, is not a 'removal out of the township' within the meaning of such statute."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the committeemen and committeewomen both Republican and Democratic, who were elected in the August Primary of 1938, as township committeemen and committeewomen of Carondelet Township of St. Louis County hold office until the August Primary of 1940 when new committeemen and committeewomen shall be elected from both Lemay Township and Gravois Township.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

SCHOOLS: Teacher, after obtaining judgment for salary, can compel directors of the district to levy special levy to pay judgment, if it is not in excess of the constitutional limit.

November 25, 1940 11/26

FILED
93

Mr. N. Earl Walker, Sup't.
Butterfield Public Schools
Butterfield, Missouri

Dear Sir:

This department is in receipt of your letter of November 20th wherein you make the following inquiry:

> "In our circuit court at present there is a case pending in which a former teacher is asking for a judgment against our school district for the amount of some school warrants which were not paid because there were no funds from which they could be paid.
>
> If the plaintiff should obtain the judgment for which he is asking can the court force our school district to run a special levy to pay it? We have no funds which could be used to pay it. May we have your opinion in this matter?"

In the decision of State ex rel. Hufft v. Knight 121 S. W. (2nd) 762, the Springfield Court of Appeals had the identical situation which you present before it. We herewith quote the pertinent part of the decision, l.c. 764:

"It will be noted from the stipulation filed by the parties that all the matters and things alleged in the petition for mandamus are true. The petition alleges that the directors can, under the law, certify the levy of an assessment of 65 cents on the $100 valuation of the District, under the following statutes and constitutional provisions: Sections 9214, 9226, 9284 and 9261, R. S. Mo. 1929, Mo. St. Ann. Sections 9214, 9226, 9261, 9284, pp. 7086, 7092, 7109, 7143, and Article 10, Sec. 11, Constitution of Missouri, Mo. St. Ann. Const. art. 10, Sec. 11. Therefore we presume that the requirements of these statutes have been met. If the directors can recommend to the county clerk a levy of 65 cents on the $100 valuation and instead of doing so, merely recommend a levy of 20 cents on the $100 valuation, which it is conceded is not a sufficient levy to pay the judgment, which the appellant holds against the School District, then mandamus will lie to compel the directors to certify such tax as can be legally levied and apply the surplus, after paying current expenses, to the payment of the judgment held by appellant.

Mandamus is a proper remedy to enforce a judgment against a municipal or public corporation and it has been generally used for such purpose in this state. It is an ancillary proceeding to the main suit and when so employed is not a new suit, but simply process essential to jurisdiction. It is a means of enforcing the collection of a judgment against a municipal corporation and is the legal equivalent of an execution upon a judgment against an individual. State ex rel. Hentschel v. Cook, Mo. App., 201 S. W. 361; State ex rel. Edwards v. Wilcox, Mo. App., 21 S. W. 2d 930. Since an execution may not be run against the property of a school district or other political sub-division of the State (State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498; City of Edina v. School District, 305 Mo. 452,

267 S. W. 112, 36 A.L.R. 1532; Sec. 1161, R. S. Mo. 1929, Mo. St. Ann. Sec. 1161, p. 1424) the only other procedure available to a judgment creditor to enable him to collect his judgment is for a court of competent jurisdiction to issue its writ of mandamus, requiring the extension of a sufficient levy within the constitutional limits, to provide funds for the payment of the judgment. State ex rel. Hentschel v. Cook, supra; State ex rel. Edwards v. Wilcox, supra.

Mandamus, of course, cannot be employed to control the discretion of one authorized to determine the levy necessary to provide funds necessary for a district. Yet, a school district owes the duty to pay an obligation established by a judgment against it, and its officers are required to take such steps as the Constitution authorizes for the immediate discharge of the liability fixed by the judgment. Its duty to do so results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised. However, a court cannot by mandamus proceedings compel a municipal sub-division of the state to levy a tax in excess of the maximum fixed by the Constitution. Bushnell et al. v. Drainage District, Mo. App., 111 S. W. 2d 946. The duty of a school district to discharge its obligations, if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district and mandamus does not interfere with any discretionary powers entrusted to the directors.

State ex rel. R. E. Funsten Co. v. Becker et al., Judges of St. Louis Court of Appeals, 318 Mo. 516, 1 S. W. 2d 103; State ex rel. Kirkwood School District v. Herpel, Mo. App., 32 S. W. 2d 96."

Based on the above decision, we are of the opinion that in the event a school teacher obtains a judgment for the warrants in question, the school district can be compelled to extend the levy sufficiently for the purpose of providing funds for the payment of the judgment. Of course, the amount of the levy must be within the constitutional limits.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

OWN:RT

MORTGAGES AND
DEEDS OF TRUST: Recorder of Deeds of City of St. Louis must record trustee's deed under a foreclosure, where the note presented at the time was unpaid and gave the trustee authority to foreclose and give trustee's deed.

January 17, 1940

H18

FILED
94

Hon. Edgar H. Wayman
City Counselor
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 4, 1940, which reads as follows:

> "The Recorder of Deeds of the City of St. Louis has requested this office to secure an opinion from you in regard to the interpretation of Section 3096a, Laws of Missouri 1933, page 192, in respect to a trustee's deed filed for recording, where there were several principal notes, but only a portion of them was presented as unpaid. The terms of the instrument are as follows:
>
> > "By their deed of trust dated June 13, 1930, and recorded in the office of the Recorder of Deeds for the City of St. Louis, Missouri, in Book 5047, at page 124, Bertha P. Tucker and A. A. Tucker, her husband, conveyed to Max Haas, trustee, certain real estate situate in the City of St. Louis, which conveyance was made in trust to secure the payment of one (1) principal note

for $500.00 due in 30 months, two (2) principal notes each for $1,000.00 due in 3 years, one (1 principal note for $1,500.00 due in 3 years, and two (2) principal notes each for $2,000.00 due in 3 years, and thirty-five (35) semi-annual interest notes, all of which interest notes have been paid, as well as said principal note for $500.00. The time of payment of said five (5) principal notes due in three (3) years after their date was extended for three (3) years after their maturity, with interest at 6% per annum, payable semi-annually. All of said principal notes were, by endorsement thereon, identified by the said Recorder of Deeds as being the notes secured by said deed of trust, and were endorsed and delivered by Joseph H. Schnietz, the payee therein, to divers persons.

"Said deed of trust provides that 'if either one of said notes, or any part thereof, be not so paid at maturity, according to the tenor of the same, or if said taxes, general and special, be not promptly paid when due, * * *, ' the trustee may proceed to sell said property at public vendue or outcry at the east front door of the Court House in the said City of St. Louis, to the highest bidder for cash, * * * and upon such sale shall execute a deed in fee simple of the property sold to purchaser or purchasers thereof, etc.

"Default having been made in payment of said five (5) principal notes in three (3) years, which was extended as aforesaid for three (3) years until

> June 13, 1936, as well as in the payment of certain interest, general and special taxes, the trustee in said deed of trust proceeded to sell said mortgage of property at the request of the holder of two (2) of said principal notes for $1,500.00 and $2,000.00 respectively presented to the trustee, and did sell said property on July 20, 1939, to Gustav M. Shoemann and thereupon the trustee made and executed his deed as trustee to the said Shoemann. Thereafter the said Shoemann presented said trustee's deed, for recording, to the office of the said Recorder of Deeds, who declined to accept said deed for record in his office on the ground that all of said five (5) unpaid principal notes must, under the Act approved April 18, 1933, (being Section 3096A of Session Laws of Missouri, page 192) be presented to the Recorder for his notation thereon, as provided by said Act.
>
> "The Recorder was unwilling to accept the trustee's deed for recording, due to the fact that he was advised that the notes were not payable to bearer, but were payable to individuals, and were in the hands of several owners. The Recorder will appreciate advice from you as to whether, under said section, he may accept the trustee's deed for record, under the circumstances."

Section 3096b, Session Laws of 1933, page 191, which only applies at the present time to the city of St. Louis and St. Louis County, provides that it is mandatory that notes, bonds and other securities under mortgages and deeds of trust must be identified by the Recorder of Deeds when the mortgage or deed of trust is presented for filing.

The general laws, Section 3096 R. S. Missouri, 1929, in regard to identification of notes and other securities under mortgages and deeds of trust are not mandatory but only permissible at the option of the payee of said instruments.

Section 3063 R. S. Missouri, 1929, partially reads as follows:

> "Deeds of trust in the nature of mortgages of lands may, in addition to being foreclosable by suit, be also foreclosed by trustee's sale at the option of the holder of the debt or obligation thereby secured and the mortgaged property sold by the trustee or his successor in the same manner and in all respects as in case of mortgages with power of sale; * * * "

Section 3075 R. S. Missouri, 1929, reads as follows:

> "All mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee or his personal representatives, in pursuance of the provisions of such mortgages, shall be valid and binding by the laws of this state upon the mortgagors, and all persons claiming under them, and shall forever foreclose all right and equity of redemption of the property so sold: Provided, that nothing herein shall be construed to affect in any way the rights of a tenant to the growing and unharvested crops on lands foreclosed as aforesaid, to the extent of the interest of such tenant under the terms of contract or lease between such tenant and the said mortgagor or his personal representatives."

The above section permits the mortgagee to foreclose in pursuance of the provisions of such mortgage. Under the statement in your request it is provided that the mortgagee or trustee may foreclose upon the non-payment of either of said notes.

Section 3096a, Session Laws of Missouri, 1933, page 193, only applies to the city of St. Louis and St. Louis County at the present time, and partially reads as follows:

> "In all cities in this State which now have or which may hereafter have 600,000 inhabitants or more and in all counties of this State which now have or may hereafter have 200,000 inhabitants and less than 400,000 inhabitants, no trustee's deed or mortgagee's deed under power of sale in foreclosure of any deed of trust or mortgage shall be accepted by the recorder of deeds for record unless the principal note or notes or other principal obligations which were unpaid when the foreclosure sale commenced and for the default in payment of which foreclosure is had, are produced to the recorder, or if said notes are lost then the affidavit of the owner of the principal notes or obligations that they are lost. Upon such trustees's or mortgagee's deed being filed for record, the recorder shall make a notation on the margin of the record of the deed of trust or mortgage, and on the said principal note or notes or other principal obligations showing that such deed in foreclosure has been filed of record, in substantially the following form: 'Deed under foreclosure filed . . . . 19.. . . Recorder.'
> * * * * * * "

Under the above section it is specifically provided that before the Recorder of Deeds should file a trustee's deed he should demand all of the principal note or notes, or other principal obligations which were unpaid when the foreclosure sale commenced; but if any of the notes are lost the owner of the principal notes may make an affidavit describing them and that they have been lost. The above partial section only applies to general mortgages or deeds of trust which have no special clause as to the right of

the trustee to foreclose in case of the non-payment of one of the principal obligations and it is mandatory that all principal notes or obligations be presented before the Recorder of Deeds shall file a trustee's deed issued by the trustee or other officer given the power of sale and foreclosure.

Section 3096a, Session Laws of Missouri, 1933, page 193, partially reads as follows:

> "Except, whenever any trustee's deed or mortgagee's deed under power of sale in foreclosure of any mortgage or deed of trust providing for the issuance of more than one principal note or bond shall be presented for recording, it shall be accepted by the Recorder of Deeds for record upon the presentation to the Recorder of the unpaid principal note or notes or bonds required by such mortgage or deed of trust to permit the trustee to sell the property under foreclosure sale. A foreclosure sale shall be deemed to have commenced within the meaning of this act upon the first publication of the notice of sale."

This partial section sets out a different exception than is set out in the partial section above set out. In this latter partial section, section 3096a, it is specifically stated that where the trustee's deed or mortgagee's deed under power of sale under any deed of trust or mortgage which provided for the issuance of more than one principal note or bond and also provided for the foreclosure on the non-payment of any one or any number of notes less than the full number of notes or bonds set out in the mortgage, or deed of trust, all that would be necessary would be the presentation of the note or notes described under the mortgage or deed of trust that is necessary for the trustee or other officer foreclosing to begin foreclosure for the non-payment of the obligation or obligations. It will be noticed in the deed of trust set out in your request that there were

five principal notes, in the amount of $1,500.00, $2,000.00, $2,000.00, $500.00 and $500.00. It will also be noticed that the trustee in beginning the foreclosure proceeded to foreclose upon the non-payment of only two principal notes of $1,500.00 and $2,000.00, respectively. It will also be noticed that the deed of trust provides that if "either one of said notes or any part thereof be not so paid at maturity * * * the trustee may proceed to sell said property at public vendue etc., * * *." That clause, in the opinion of this Department, was placed in the deed of trust so as to come within the laws of Section 3096a, supra, as set out in exception to first part of Section 3096a. According to the general law in the first part of Section 3096a, it would have been necessary for the person offering the trustee's deed for recording, to present all of the notes or an affidavit from the owner of all the principal notes, that some, or all of the principal notes have been lost. The exception at the latter part of Section 3096a was enacted specifically for the purpose of having the same deed or mortgage cover more than one principal note, and also for the purpose of setting out different grounds for the trustee or other officer to act upon the non-payment of the obligations. This exception specifically requires the Recorder of Deeds to record the trustee's deed where the trustee has completed the foreclosure under all of the terms set out in the mortgage or deed of trust. We call your special attention to a part set out in the exception of 3096a which reads as follows:

> "* * * upon the presentation to the Recorder of the unpaid principal note or notes or bonds <u>required by such mortgage or deed of trust to permit the trustee to sell the property under foreclosure sale</u>. * * "

According to your request all that was required for the trustee to sell the property under foreclosure sale was the non-payment of <u>either one</u> of said notes.

CONCLUSION

In view of the above authorities, it is the opinion of this Department that the trustee's deed, as set out in your request, should be filed for record by the Recorder of Deeds upon the presentation of the two principal notes for $1,500.00 and $2,000.00, respectively, and it is not necessary to obtain an affidavit of the owner of the other notes as set out in Section 3096a, supra.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

MUNICIPALITIES: May not discriminate between residents and non-residents on license tax; may transmit water to persons outside corporate limits through pipes not owned by the city.

3/4

February 28, 1940

FILED
96

Honorable Walter W. Whinrey,
State Representative,
Lawrence County,
Mount Vernon, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of February 19, 1940, requesting our opinion on the following questions:

1. May a fourth class city impose a license tax that discriminates between residents and non-residents on trucks of residents of the city and bakery trucks of non-residents.

2. May a fourth class city charge a minimum of sixty cents for furnishing water from its municipal plant to residents and charge a minimum of one dollar to those outside the corporate limits.

3. Is a fourth class city required to own the pipe line through which the water is transmitted to non-residents.

I.

In attempting to answer your first question we must assume that the tax imposed is upon the occupation engaged in and not upon the vehicle as a vehicle license, and that the bakery truck is delivering and selling bread at wholesale. With these assumptions the question resolves itself into one which has been answered numerous times by our courts.

In Nafziger Baking Co. v. City of Salisbury, 48 S. W. (2d) 563, (Mo. Supreme), the court had before it an ordinance that attempted to exact a higher license tax from the plaintiff, a non-resident, than was exacted from residents. It was contended that such an ordinance violated the Fourteenth Amendment to the Constitution of the United States as denying equal protection of the law and as taking property without due process of law. On this the court said, l.c. 564:

> "Such ordinances, being discriminatory and unjust, have often been condemned as being violative of the provisions of the Constitution above referred to. (Citing cases.)"

Therefore, it is our opinion that a city of the fourth class cannot discriminate between residents and non-residents in fixing license taxes.

While you do not specifically request it, we make the further observation that said city cannot exact any license tax from a non-resident bakery truck that is making deliveries and sales at wholesale. (Ward Baking Co. v. St. Genevieve, 119 S. W. (2d) 292, (Mo. Supreme). Nor can said city exact a motor vehicle license tax except where it is done in conformity with the rules laid down in Sikeston v. Marsh, 110 S. W. (2d) 1135, (Mo. App.) and West Plains v. Noland, 112 S. W. (2d) 79 (Mo. App.).

II.

We cannot undertake to answer your second inquiry because the control of rates charged by municipal water plants to patrons outside the corporate limits is vested in the Public Service Commission. Sections 5136, 5189, R. S. Mo. 1929; Public Service Commission v. City of Kirkwood, 4 S. W. (2d) 773, (Mo. Supreme). We suggest that you consult that body relative to question two.

III.

Section 7645 R. S. Mo. 1929 authorizes cities of the fourth class to sell water from their municipal

plants to other cities, persons and private corporations outside the city limits. When this sale is made to another city the purchasing city must supply the pipes for transmitting the water from the selling city to the purchasing city. (Section 7647 R. S. Mo. 1929).

While the point has never been directly passed upon we think the case of Taylor v. Dimmitt, 78 S. W. (2d) 841, (Mo. Supreme) is completely analogous to the instant question. In that case a fourth class city made a contract to furnish electrical power from its municipal plant to another city. This was done in conformity with Section 7642 R. S. Mo. 1929, (which is identical with Section 7645, supra, with the exeeption that it pertains to electric current instead of water). The city supplying the power undertook to erect the transmission lines necessary to transmit the current to the purchasing city. The court held that this could not be, due to the terms of Section 7644 R. S. Mo. 1929, (which is identical with Section 7647, supra, except that it relates to electrical current) which makes it the duty of the purchasing city to erect the transmitting lines and enjoins the supplying city from erecting the lines.

Thus we see that a fourth class city is authorized to sell water to those outside the corporate limits but cannot construct the pipe lines and if they sell at all it must be through pipes owned by another person or corporation. The legislature cannot be presumed to have expressly given such a city the right to sell water outside the corporate limits and then nullify that right by failing to authorize them to transmit water through pipes owned by another person.

Therefore, we are of the opinion that a city of the fourth class may transmit the water sold from its municipal plant to persons outside the corporate limits through pipes not owned by the city.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

LLB:CP

CORONERS: May perform autopsies only at inquests where a jury is called.

December 16, 1940

FILED 96

Dr. R. Ned White
Coroner
Greene County
Springfield, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated December 9th, 1940, as follows:

> "Having been elected Coroner of Greene County, after filling out the term of the preceeding Coroner, there are a few points concerning the duties of this office I would like to clarify. I have consulted the prosecuting Attorney of this County but would like to get your opinion.
>
> "Briefly, the problem is; to what limits may I perform Autopsies without permission of families? It has been my custom to do these on all cases in which there is any question of death by violence.
>
> "It is my understanding there is some litigation in Jackson County as a result of doing Autopsies on any and all cases coming under the Coroner's jurisdiction. Does one have the right to do Autopsies on (1) auto accident victims to determine the means of death, (2) in which there is difficulty in making an assumption of

death by any natural cause, and (3) questionable deaths from alcoholism?

"It is my remembrance from interne days in St. Louis that any case turned over to the Coroner could be posted without permission. Naturally I do not think it wise, even if medically, desirable, to post all cases but I do feel that it would be a great advantage to do more than we are now doing. Just how far am I entitled to go and still be free of any danger of law suits."

In considering the questions presented, the following statutes regarding the office of the Coroner should be considered - Section 11608 R. S. Missouri, 1929, which reads as follows:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

And, Section 11612 R. S. Missouri, 1929, which reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being

> found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Also, Section 11631 R. S. Missouri, 1929, which reads as follows:

> "When a physician or surgeon shall be called on by the coroner, or any magistrate of the county acting as the coroner, to conduct a post-mortem examination, the county court of said county shall be authorized to allow such physician or surgeon to be paid out of the county treasury any sum as a fee not exceeding ten dollars, to such physician or surgeon who may be engaged in said examination."

And, Section 11636 R. S. Missouri, 1929, which reads as follows:

> "The county court may authorize and require the coroner to pay, at the view or inquest itself, the legal fees due to jurors, witnesses and

interpreters at the same, out of money to be advanced to him, from time to time, out of the county funds, and for the legal disbursement of which he and his sureties shall be liable on his official bond, in any county in which such order shall have been made by the county court thereof; jurors, witnesses and interpreters, at any view or inquest, shall receive only such fees as are allowed by law, for the time being, for like services in a civil case before a justice of the peace; and the county court may prescribe the form and manner in which the coroner shall make proof to it of his payment of such fees. It shall be the duty of the coroner to summon to the view or inquest only such number of witnesses as, from a preliminary inquiry into the nature of the case, and the cause of the death, may reasonably appear sufficient to prove the essential facts thereof; and if it shall appear to the county court that any witness had been unnecessarily summoned to testify at a view or inquest, the fees paid as aforesaid to such witness shall not be allowed in favor of the coroner in the settlement of his account for the money so advanced to him as aforesaid, except in a case in which some credible person shall have declared, under oath, to the coroner, that the person whose body is to be viewed came to his death by violence, or other criminal act of another, the coroner shall not summon any jury, but shall himself view the body and declare the cause of death."

We are able to find only one case in which the power of a coroner to perform an autopsy has been discussed at length. In Patrick v. Employers Mut. Liability Ins. Co., 118 S. W. (2d) 116, a decision by the Kansas City Court of Appeals, the duties of a coroner were the subject of discussion. In that case the facts were that John Patrick, the husband of plaintiff, died while attending a fire in his official capacity as fireman for the City of Macon, Missouri. The deceased was taken to an undertaking establishment and there a physician, at the request of the insurance company carrying the Workmen's Compensation insurance for the city, performed an autopsy. The coroner was present and orally stated that he was ordering the autopsy. The action was one for damages because of the alleged wrongful mutilation of the body of the deceased. It was admitted that the physician performed the autopsy in a scientific and careful manner.

In the opinion, having quoted the statutes above set out, the court defined the powers of a coroner as follows: (l. c. 122)

> "Under the provisions of these sections it seems apparent that the coroner has no authority to perform an autopsy under the circumstances here present, or have one performed, except in connection with an inquest to be held before a coroner's jury. It could hardly be said that section 11631, even standing alone, authorizes an autopsy, under any circumstances that the coroner might in his judgment see fit to hold it for; on its face, it does not purport to be an authorization of that kind, but merely a section dealing with fees for the performance of an autopsy. Of course,

it is beyond the realm of probability that the legislature ever intended to confer upon a coroner the right to perform an autopsy in any case that, in his judgment, he might deem proper, for this would empower him to enter the homes of our citizens indiscriminately and over their protests remove corpses under any circumstances, regardless of the cause of death, provided that the coroner thought an autopsy, in a particular case, would further the advance of science or some purpose believed desirable by him. The legislature had no intention to confer any such authority upon the coroner. Section 11631 must read in connection with the whole chapter in which it appears relating to 'inquests and coroners'. In no place in the chapter is the coroner authorized to hold an autopsy under the circumstances here present except in connection with an inquest, to be held before a jury, of persons supposed to have come to their deaths by violence or casualty, the latter term including accidents. In view of the circumstances surrounding Patrick's death the coroner, in his discretion, might have conducted an inquest but there was none held and, therefore, the coroner had no authority to hold an autopsy. Indeed, there was evidence that it was not the intention of the coroner to hold an inquest as he testified that the autopsy was performed merely that he might have information upon which to make out a death certificate but, aside from this, while it might be desirable for the coroner to hold an autopsy to ascertain if an inquest should be held, the statute gives him no such authority."

By the use of the words "these sections" in the opening sentence in the above quotation, the Judge referred to Sections 11608, 11612, and 11631 R. S. Missouri, 1929, (supra), which he had just quoted. The opinion continues as follows:

> "* * * * * * * * * * * * * * * * *
>
> There is conflict in the authorities as to the capacity (judicial or ministerial) in which a coroner acts in performing his duties. Some of the authorities are to the effect that they are judicial in character, others quasi judicial and others ministerial, depending what the act performed. In this state a coroner acts judicially in respect to determining whether an inquest shall be held. Boisliniere v. The Board of County Commissioners, 32 Mo. 375. However it was stated in Queatham v. Modern Woodmen, 148 Mo. App. 33, 48, 127 S. W. 651, that aside from this, there is nothing in the statute according the force and effect of a judicial proceeding to an inquest, itself. If this is true, of course, there is nothing judicial about the calling or holding of an autopsy. However, we are not concerned with this matter, for, as we have already stated, the coroner had no authority, so far as the facts in this case are concerned, to hold an autopsy except in connection with an inquest before a jury and in performing the one in question the coroner was not acting in any capacity but entirely outside of his office."

In another portion of the opinion, Section 11636, supra, is discussed in the following language:

> "Defendant relies upon that part of section 11636 beginning with the word 'except' as follows: In this connection defendant urges that this part of section 11636 directs that the coroner shall not call a jury but shall himself view the body and declare the cause of death, unless the death was caused by violence (which is not this case) and, since, in this case the coroner was of the opinion that it was necessary to perform an autopsy in order for him to declare the cause of the death and since, in this state, a coroner is necessarily clothed with discretion in the performance of his duties which are judicial in character, plaintiff's testimony shows affirmatively that the autopsy was legally and properly held by him.
>
> "Section 11636 is primarily, if not exclusively, a fee statute. That part of the section beginning with the word 'except' is very unusual not only in its construction, as to the language used, but in the way it is connected with the rest of the section. While it apparently recognizes the power in the coroner to dispense with a jury and declare the cause of death himself when some credible person shall declare under oath that the person whose body is to be viewed came to his death by violence, the whole section is one on the subject of fees and the proper construction of that part beginning with the word 'except' would seem to be that it shall not

> be considered that witnesses are unnecessarily summoned where the coroner elects, under the circumstances mentioned in the statute, to declare, himself, the cause of the death of course under such circumstances, the necessity of a hearing of testimony by a jury is obviated.
>
> " In the case at bar there was no oath of any person that the deceased came to his death by violence and that part of section 11636 in question has no application. Consequently, it is unnecessary for us to say whether the coroner would have authority to hold an autopsy where no jury is summoned under the circumstances mentioned in that part of section 11636 in controversy."

We may arrive at the conclusion from the above that a coroner would be justified in performing an autopsy in connection with any inquest held before a jury, but that it is doubtful that a coroner in any instance should order or perform an autopsy in any case where he,himself, declares the cause of death without the assistance of the jury.

CONCLUSION.

It is therefore the conclusion of this department that a coroner may perform, or cause to be performed, by a competent physician an autopsy at any inquest where a coroner's jury is duly summoned for the purpose of aiding the decision of such jury, and his authority is limited to such cases only.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

RLH:RW

COUNTY COURT: MAY VACATE ADDITIONS IN UNINCORPORATED TOWNS SO THAT ASSESSMENT WILL BE BY ACREAGE RATHER THAN TOWN LOTS.

January 23, 1940. 1-23

FILED 97

Hon. Shelton Williams, County Clerk
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of November 27, 1939, which reads as follows:

> "I would like an opinion as to whether town lots in an noncorporated town can be assessed, as acreage instead of town lots. This land is not used for anything but pasturage land. The town is almost abandoned. And the lots have no value except as other acreages.
>
> "Can the county court issue an order changing this town lots to acreages?"

Section 7168 R. S. Mo. 1929, provides the procedure for vacating additions:

> "If any person shall lay off an addition to any town or city which he does not improve, and shall be the legal owner of all lots contained in such addition, such person, or any other person who shall become the legal owner thereof, shall have such addition or any part thereof vacated by applying to the county court of the proper county, after notice as hereinbefore provided and proof of ownership of such lots, but such act of vacation shall have no force or effect until a certificate thereof be made

> out by the clerk of the said court and filed for record in the recorder's office of said county."

In the case of Spurgeon v. Hennessey 32 Mo. App. 83, l.c. 87, the court had occasion to construe the above section and said:

> "We do not think that these section (5047, 5048, R. S. Mo. 1879, now 7165, 7166, R. S. Mo. 1929) apply to the case at bar; for here, it is not a "street" or an "alley" that is sought to be vacated but part of an entire addition, including, perhaps, many streets, alleys and public squares. It follows, then that this proceeding must be governed by Section 5050, and must stand or fall by a fair construction of that statute. This statute was intended to meet just such a case as the one before us, and we do not see that its validity is impaired by reason of the fact that there are several owners of the addition sought to be vacated. The statute does say. "If any person shall lay off an addition * * * and shall be the legal owner of all lots," but does it follow that two or more persons may not lay off an addition to a town, and afterwards seek to have the same vacated? Or that a number of persons who are owners of various lots may not join in the same petition for the same end and purpose? Here these petitioners are the legal owners of the lots sought to be vacated. Shall we say to them that, forsooth, as there is more than one owner, the statute does not apply? We are not willing to place any such narrow construction upon the laws of this state. It will be observed that this section, unlike section 5048, makes no provision for a remonstrance, and for reasons which readily suggest them-

> selves; nor for a continuance until the next term of the court. It provides for notice and proof of ownership of the lots, giving the county court jurisdiction to hear and determine the matter. The judgment vacating the addition was made at the February term of the court, after due notice and proof of the same, and we see no good reason why the jurisdiction of the court should be questioned."

Under Section 7168, supra, it would not be necessary for one person, to own all the town lots sought to be vacated. It is sufficient that the petitioners be the legal owners of the lots sought to be vacated.

The court in the case of State v. Kennedy 207 S. W. (Mo. App.) 71, after discussing the applicability of Section 9258 (now Section 7168, supra,) points out that after vacation the proper legal description of the property comes back:

> "It is true, in a sense, that the identity of "block 21" was not destroyed by the vacation, but the legality of that description of the property was destroyed. The ground itself, of course, remained, and no doubt a surveyor could, by referring to the record of the vacated plat, have located its boundaries; but so, also, could he have determined the lines of the land by its proper legal description, which came back into effect when the vacation was made, and, since it was in this status at the time the assessments were made, they should have been made by the proper and valid description then existing."

From the foregoing we are of the opinion that the county court may vacate part of or the entire addition in

unincorporated towns so that the assessment will be by acreage rather than town lots provided the procedure outlined in Section 7168 R. S. Mo. 1929, is complied with.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting Attorney General)

MW/mc

COUNTIES:
WARRANTS:
JUDGMENTS:
PRIORITY OF PAYMENT:

Various questions relative to the payment of county warrants and of judgments obtained on county warrants and as to the priority of such judgments over such warrants discussed.

February 8, 1940

FILED
97

Hon. Carl Williamson
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submitted a request as follows:

"1. (a) When a County Warrant has been reduced to a circuit court judgment, does that warrant lose its identity as a warrant and become merged in the judgment so that the judgment debtor must look to his judgment as a judgment for collection; (b) or does he retain all of his original rights, claim and status on the Register Warrant; (c) or must he wait until all registered warrants for the same year in all the funds and classes are paid before he can look for payment.

"2. (a) When a county warrant has been reduced to a circuit court judgment, and the treasurer receives the money with which to pay said judgment warrant, must the Treasurer hold that money in reserve just the same and pay the warrant even though it is in judgment; or (b) in that event is the warrant automatically cancelled on the register, or must the

> County Court order it cancelled; and (c) can the Treasurer go ahead and use the money to pay the next warrants in line in the same fund; (d) and if so, after all the warrants in that particular fund have been paid for that year, can the County Court order any cash balance on hand for that fund, transferred to another fund for the same year, to pay unpaid and uncancelled warrants in the other fund, to the exclusion of the warrant in judgment in the first fund."

It appears from your request, and the exhibit attached thereto, that your County has outstanding warrants issued for salaries and for contingent funds for the year 1933.

You do not state in your request whether or not these warrants were within the anticipated revenue for that year or the reason why these warrants were not paid. Of course, if the warrants were in excess of the anticipated revenue for the year 1933, then under Section 12 of Article X of the Constitution they would be void. However, for the purpose of this opinion we are assuming that these warrants were legal and the County Court was acting within its powers when it issued these warrants.

In your request you speak of the registering of county warrants. Such warrants are certified by virtue of the provision of Section 12139, R. S. Missouri, 1929, as follows:

> "He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which

> he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: Provided, however, that no warrant issued on account of any debt incurred by any county other than those issed on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated."

It will be noted that the above proviso clause in the above section prohibits the payment of an outstanding warrant until all warrants issued for money due from the county on account of services that are usual and for all expenses necessary to maintain the county organization for that particular year have been paid and liquidated. Following that proviso the warrants which you refer to in yo r exhibit could not be paid this year until all of the current expenses of the year have been paid and liquidated, then if a balance remains they may be paid as hereinafter set out.

The first part of your request is whether or not a warrant will lose its priority on the register book by being reduced to a judgment. We think that this question is fairly well answered in the case of Douglas County v. Bank of Ava, 333 Mo. 1195, l. c. 1200, wherein the court said:

> "It is evident here that if the defendant bank had sued plaintiff on these county warrants drawn on and payable out of the county revenue for 1930, it would not be a complete defense to show that the county had no such funds out of which to pay same, but the status of any judgment obtained against the county on these warrants drawn on the county revenue fund would be <u>subject to the same limitations and restrictions</u> as to payment as the warrants themselves and could not be enforced against the deposit now in question belonging to other funds."

In this case the status of a judgment obtained on warrants was held to be the same as that of the warrant under which it was obtained. That being the case, it seems that the fact that where a warrant is issued on and a judgment obtained thereon, that the judgment would take the place of the warrant on the register book provided for under said Section 12139, supra.

In the case of Sturdivant Bank v. Stoddard County, 58 S. W. (2d) 702, l. c. 704, the court said:

> "In Isenhour v. Barton County, 190 Mo. 163, 170, 88 S. W. 759, we held that county warrants are merely evidences of indebtedness, and that the General Assembly had the power to provide, as it did by what is now section 12171, R. S. 1929, that, when any such warrant is presented for payment, if there is no money in the treasury for such purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same. Section 12139, R. S. 1929 (Mo.St.Ann. Sec.12139),

> further provides that 'all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment.' Also we have ruled in State ex rel. v. Hortsman, 149 Mo. 290, 295, 50 S. W. 811 (opinion disproved in some respects in State ex rel. v. Johnson, 162 Mo. 621, 633, 63 S. W. 390, but reaffirmed in this), that a judgment founded on a county warrant gives no preference over the warrant as to payment. * * * *"

In the above citation the court held that the county warrant is merely an evidence of indebtedness and that a judgment founded on such a warrant gives no preference over the warrant as to payment. In other words, the judgment takes the same classification as to payment as the warrant had.

We find questions which are similar to the ones which you have submitted discussed by the court in the case of State ex rel. v. Johnson, 162 Mo. 621, l. c. 628:

> "Three propositions are presented:
>
> "First. Is the surplus revenue of a county, remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, applicable to the payment of outstanding valid unpaid county warrants for previous years?
>
> "Second. If so, what is the lawful method of applying such payment? Must the warrants be paid in the order of their presentation and registration, or are they payable pro rata to all the outstanding indebtedness?

"Third. If such surplus is so applicable and if payable in the order of their registration, is it the duty of the treasurer to so pay them or must the county court first distribute the fund for the payment of such warrants before the treasurer can pay any of such warrants for past years' indebtedness?

"These questions must all be answered by a construction and interpretation of our statute law on the subject in the light of the Constitution of this State.

"First. A correct answer to the first proposition can only be given by keeping in view section 12 of article 10 of the Constitution, which ordains that 'no county ..... shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose;nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein'.

* *

"It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes,

still it might happen from some unforseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. (Randolph v. Knox County, 114 Mo. 142; Andrew County v. Schell, 135 Mo. loc. cit. 39; State ex rel. v. Payne, 151 Mo. loc. cit. 673; Railroad Co. v. Thornton, 152 Mo. 570, State ex rel. v. Allison, 155 Mo. loc. cit. 344; and on this point, Reynolds v. Norman, 114 Mo. 509.)

"Accordingly we answer the first proposition in the affirmative: that a warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year for which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible.

"Second. We are thus brought to the second proposition: in what order are these unpaid warrants to be paid? In the order of their registration, or pro tanto, if there is not a sufficient supplus to pay all?

"This must be solved by the statutes. Section 6771, Revised Statutes 1899 (sec. 3166, R. S. 1889) of the article entitled 'County Treasurers and County Warrants,'

provides that, 'He (the county treasurer) shall procure and keep a well bound book in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money, by the county court of the county of which he is the treasurer, stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants in the order in which they shall be presented for payment. Provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated.'

"This statute was substantially adopted, except the proviso therein, in 1855 (R. S. 1855, p. 521, sec. 9), and was ontinued in General Statute 1865, page 227, section 8.

"In the revision of 1879 the proviso was added to the section for the obvious purpose of having the statute conform to the Constitution. (R. S. 1879, sec. 5370.) It is found in the same words in the Revised Statutes of 1889 as section 3166.

"This section then had been the law of this State for twenty years before the adoption of the Constitution of 1875.

Prior to that, it was not necessary that a county warrant should be drawn upon a special fund or that it should come to the holder during the year in which the indebtedness was created. What, then, was the effect of the Constitution upon this section? As was ruled in Andrew County v. Schell, 135 Mo. 31, and State ex rel. v. Payne, 151 Mo. 670, that section was modified by the Constitution to the extent that thereafter the warrants drawn by the county court in any year to meet all the necessary and current expenses for that year must first be paid in full in the order of their registration, and if a surplus was left, then the section operated on all other warrants just as it had previous to the adoption of the Constitution of 1875. In a word, that section, in so far only as it conflicted with the provisions of section 12 of article 10 of the Constitution, became inoperative by force of the Constitution as soon as it went into effect, because inconsistent therewith. But with this exception there is no such repugnancy as requires us to hold it was absolutely repealed, the rule of construction being that before it shall be construed as repealed by implication only, the two must be so repugnant that both can not stand, and, we think, with the modification we have mentioned, both can stand. Such has been the opinion of the Legislature, we think, from the fact that this section has been preserved through three revisions since the adoption of the Constitution. We conclude that this surplus, after the current expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute, section 5166, Revised Statutes 1889, (now section 12139 R. S. 1929), which provides a just and

equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants, of former years and section 6771, Revised statutes 1899 (Section 12139 R. S. 1929), provides the rule of priority just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata.

* * * * * * * * * * * * * * * * * * * *

"It was not at all necessary for the county court to make any further appropriation of the fund before the treasurer could pay relator's warrant out of this surplus. The court is required to distribute the current tax into the different funds each year, and may, in proper cases, transfer moneys from one fund, when not needed, to another that is insufficient, but after all the warrants for any year have been paid there is no provision of law for distributing this surplus into different funds, but it is in the hands of the treasurer, as an executive officer, charged by the statute with the duty of disbursing the funds on warrants drawn by the county court, and as the warrants have been drawn, all he

> has to do is to pay them in the order of their registration whenever he has money enough to take up a warrant, as the law makes no provision for a partial payment thereon, but requires him to take up the warrant itself as the only voucher the law will recognize when he comes to make his settlement for payments thereon."

Under Class 6 of Section 5 of the County Budget Act it is provided in Laws of Missouri, 1933, page 344, in part as follows:

> "* * * Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. * * *"

It will be noted that the lawmakers under the Budget Act by the foregoing section have provided for the payment of warrants such as you have described out of Class 6. This section further shows that it was the intent of the lawmakers to carry out the constitutional provision and proviso clause of said section 12139 by providing that the current expenses of the county paid out of the first five classes of said section 5 should be paid before outstanding warrants are paid and, as stated above, judgments would come within the same classification as outstanding warrants.

In the Johnson Case, supra, the court has stated that these funds may be transferred from one fund to another, but after all the warrants for any year have been paid, there is no provision for distributing this surplus into different funds. The surplus is then in the hands of the treasurer and all the treasurer has to do is to pay them in the order of their registration. So the warrants which you describe in your exhibit, together with the judgment obtained on these warrants, if they

are legal warrants, would be payable in the order in which they are registered on the register book mentioned in said Section 12139.

CONCLUSION

From the foregoing, and answering your first question, will say that a judgment debtor who obtained a judgment on a county warrant must look to his judgment for payment on the same because the county warrant is only evidence of the obligation and the judgment is conclusive of it. We are further of the opinion, however, that the judgment retains the same status as a claim on the registered warrant that the warrant had, and that the judgment may be paid if funds are available in any subsequent year in the order in which it appears on the register warrant book.

Answering your second question, will say that since the warrant is merged into the judgment and that the judgment holds the same place on the warrant registration book that the warrant has, of course it would be the duty of the treasurer to hold the money in reserve for the payment of this judgment. We are further of the opinion that the warrant record is not automatically cancelled, but the record should show that the judgment has been obtained on this particular warrant which takes the place of the warrant.

We are further of the opinion that since the judgment takes the place of the warrant and since it is the duty of the treasurer to pay these old obligations in the order in which they are registered in his warrant register, that the treasurer would not be authorized to pay warrants out of the order in which they are registered, but it would be the duty of the county

treasurer to hold back a sufficient amount to pay the judgment on any warrant before he pays a warrant on a judgment based on a warrant which is registered at a later date.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:RV

SALARIES:
CENSUS:
OFFICERS: 1940 census will not cause change in the salaries of county officers during the year 1940.

November 20, 1940 11/25

FILED 97

Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

This will acknowledge receipt of your letter of July 1st, 1940, which is as follows:

"A question has arisen as to when the salary of the various county officers will be changed, and become effective should the latest census show an increase or decrease in population over the previous census. The statutes provide in a number of cases how the salaries of these officers should be determined. Sec. 11811. Salaries of county clerks, deputies and assistants-fees to county treasury (Laws of 1937) and Sec. 11786. Salaries of circuit clerks in certain counties. (Laws 1937). Sec. 11314 Prosecuting Attorney Salary of. (Laws of 1933).

"I understand the census is effective as of April 1st, 1940. Should any of the county officers be entitled to an increase due to an increase in population over the last census, would they be entitled to back pay to April 1st, 1940? If not, what will be the effective day for the increase or decrease in salaries, due to the change in population?"

I.

Your question requires a consideration of the

Federal Acts providing for the taking of the census, the publishing of bulletins and reports and the effective date of the census. The Sections of the Act which are pertinent to your question are found in Title 13, U.S.C.A., and are the following:

> "Sec. 202. Decennial census period; reports of inquiries when completed. The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period: Provided, That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States.
>
> "Sec. 213. Printing; requisitions upon Public Printer; publication of bulletins and reports. The Director of the Census is hereby authorized to make requisition upon the Public Printer for such printing as may be necessary to carry out the provisions of this chapter, to-wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this chapter or by chapters 1 and 3 of this title and to publish and distribute said bulletins and reports."

Under Section 218, U.S.C.A., Title 13 at page

13 (Annual Pocket Part) provides that upon the payment of One Dollar population returns may be obtained from the Director of Census. In the case of Ervin v. State, (1931) 44 S. W. (2d) 380, 119 Tex. Cr. 204, the court held that preliminary bulletins issued under Section 213 U.S.C.A., supra, are official and should be judicially noticed by state courts as determining matters of population.

> "Sec. 218. Certified copies of population and agricultural returns; authorization; restriction on use; disposition of fees received. The Director of the Census is authorized at his discretion, upon the written request of the governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and $1 additional for certification; * * * * "

These sections authorize the Director to publish bulletins and reports from time to time, and, upon request of any Governor or court of record to furnish certified copies of reports. The State courts have not been uniform in their holdings as to what is the effective date of the census for the purpose of paying salaries. The recent case of Kay v. Moniteau County, 134 S. W. (2d) 81, l. c. 83, decided by the Supreme Court of Missouri, is a case in which the County Court paid the salary of a Prosecuting Attorney on the 1930 census, and, although it was admitted in the trial of the case that the County did not have the official report of population until 1936, plaintiff Kay sought to recover salary upon the former population basis as determined by multiplying the vote by five. The Supreme Court, in ruling against plaintiff's contention, said:

> "* * * * * * Since the county court paid plaintiff the salary authorized under the census method, it is immaterial to plaintiff as to how the

> court acquired knowledge of the census. The census method was available and the court was bound under the law to be guided thereby."

A similar case is Carter County v. Huett, 259 S. W. 1057. In this case defendant Huett was Prosecuting Attorney of Carter County and was paid during the entire year of 1920 on the population as determined by the 1920 census which gave the County a higher classification than it had under the method of determining the population by multiplying the vote by five. In this case it was admitted that the official publication of the census was not made until March 28th, 1921. The Supreme Court, upholding the payment of salary on the census figure, said, l. c. 1059:

> "As to the fact that Carter county, as of the 1st day of January, 1920, had such a population as put it in the class whose prosecuting attorneys were entitled to receive a salary of $1,000 per annum, there is and can be no dispute. The substance of plaintiff's contention is that this fact was not and legally could not have been ascertained, within the meaning of the statute, so as to make it applicable to the salary of the prosecuting attorney for the year of 1920. There is nothing here showing an express or specific finding by the county court of the population of the county, but the making of orders for the issuance of warrants for the payment of the increased salary, involved an ascertainment of the existence of a population within a given minimum and maximum limit. The defendants, judges of the county court, in auditing and paying the salary of the prosecuting attorney, were in the exercise of their statutory authority, and it cannot be said as a matter of law, under the terms of the Census Act, or under the statute, that

> the population of the county was not ascertained, or that as a matter of law it could not have been ascertained by the decennial census of 1920 for the purpose of determining the salary paid. This is said as applicable to the case against all of the defendants herein. * * * * * * "

The case of Carter County v. Huett is quoted and cited with approval in the Kay case, supra, which was decided December 14, 1939.

The County Clerk's salary was fixed by Section 11811, R. S. Mo. 1929, and provided that the counties should be classified for the purpose of paying fees, upon the population and the population was to be determined by multiplying the vote. This section was repealed by the General Assembly of 1937 and a new section 11811 was enacted. This new section 11811, found at page 441, Laws of Missouri 1937, is as follows:

> "The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: (Here follows the classification of counties and the salary brackets.) Provided, that the county court in all counties in this State having a population of 15,000 and less than 40,000 persons may allow the county clerks, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed $500.00 per annum, to be determined by the county court of such county. Provided, further, that the county court shall determine that the work required to be done by such clerk

> or clerks demands or requires such extra remuneration. It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for same, whichsaid report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

The salary of the Circuit Clerks of the various counties was provided for in Section 11786, R. S. Mo. 1929. This section was repealed by the General Assembly in 1933 and a new section 11786 enacted. This new section is found at page 369, Laws of Missouri 1933. In 1937 the General Assembly repealed Section 11786 as enacted by the Legislature of 1933 and enacted a new section 11786, which is found at page 445, Laws of Missouri 1937. This section is as follows:

> "The Clerks of the Circuit Courts of this State shall receive for their services annually the following sum: (Here follows the classification of

counties and the salary bracket.) Provided, that in any county wherein the Clerk of the Circuit Court is ex-officio Recorder of Deeds, said offices shall be considered as one for the purpose of this Section; Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties; Provided, further, that until the expiration of their present term of office, the persons holding the office of Circuit Clerk shall be paid the maximum amount as now provided by law, in the manner provided by this Act."

There is also the question involved as to whether or not the salary should take effect beginning at the first of any year of their term of office or whether

(1)

the year can be divided and salaries increased or decreased that year of the years of their term of office. It has always been the attitude of the Supreme Court that statutes in regard to salaries should not retrospectively increase a salary unless the statute specifically states that the salary should be dated or increased retrospectively. The first case cited on that subject was State ex rel. Attorney General v. State Auditor, 36 Mo. 67, l. c. 70, where the court said:

> "* * * It is contended that by virtue of the words 'annual salary,' therein used, the increased salary should commence on the first of January preceding, being the beginning of the quarter of that year.
>
> "There is no just or reasonable rule of interpretation which will warrant such a conclusion. By our general law, acts take effect ninety days after their approval, unless a different time be designated in the act itself. The Legislature in this instance fixed the time at which the law should go into force, and it will not be presumed that they meant any other or different time. There is no room left here for construction; there is neither ambiguity nor obscurity in the act. It will always be intended that the law-making power use words in their usual and proper signification; hence courts will not deviate from the common usage of the words, unless it is made clearly to appear that they were intended in a different sense, or there be good and substantial reasons for affixing a different meaning to them. The language employed in the act is clear and explicit, and to make it relate back and cover the previous period, before it took effect, would be to

> violate and torture the ordinary meaning of words. Had the Legislature intended that the increased salary should commence from the beginning of the year, they would have said so when fixing the period at which time the act should go into operation. As they did not see fit and proper to do so, there is no warrant for giving it a different meaning than that expressed therein.
>
> "The relator is entitled to salary at the rate of fifteen hundred dollars annually, till the 15th day of February, 1865, and at the rate of thee thousand dollars thereafter."

Following the reasoning in the above case, it cannot be said that since the census was taken on April 1, 1940, that an increase of the salary of the prosecuting attorney or circuit clerk should be allowed to act retrospectively to April 1, 1940, when at that time the correct amount of the population had not been ascertained or obtained by the Census Department.

In the case of State v. Linville, 300 S. W. 1066, par. 4, the court said:

> "Section 10938, R. S. 1909, provides for ascertaining the 'annual' salary. Section 11352, R. S. 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual,' as applied to salaries, means

> not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

Under the above holding, Judge White, in writing the opinion, declared that the "annual salary" meant the salary for each year of the incumbency and further stated it could not be divided or split up into periods by elections which occur during that year. In other words, when and if an increase is allowed or a decrease is shown the prosecuting attorney, circuit clerk and other officers of the county relying upon the population for their salaries, could not divide the salary as to the decrease or increase into monthly payments of the "annual salary" and could only commence at the first month of his following year in his term of office. The above case does not say that the increase or decrease should go into effect at the first month of the following year as to being affected by the federal census but only applies as to salaries being affected by elections. Also in the above case of State v. Linville, supra, Judge White, in paragraphs 2 and 3 of his opinion, said:

> "The increase of salary which a statute permits after an election showing an increase of population is not in violation of the Constitution, in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population. State ex rel. v. Hamilton, 303 Mo. 302, 260 S. W. 466. The salary of an officer, dependent upon the population as ascertained from time to time, would be determined by the law in force at the time of his election, and a law which went into effect later would not affect the matter. Therefore, if the act of 1919 was not in effect when relator was elected, it would not apply to his salary at any period of his term."

(2)

In the case of Overstreet v. Boyle County Fiscal Court, 95 S. W. (2d) 584, 264 Ky. 761, the court said:

> "The text in 46 C. J. 1019, Section 250, relating to the governing rule in the construction of statutes fixing compensation of officers, says in part: 'Statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law.' In a different subdivision of that section and on the same page, under the heading 'Compensation Based on Population' of the taxing authority, the text says: 'An "annual salary" based on population as shown by election, must be calculated for the year as a whole.' In note 98 cited to that text is the case of State v. Linville, 318 Mo. 698, 300 S. W. 1066, 1067, in which it was held that under such a measuring statute the year 'cannot be split up into periods by elections (revealing fluctuations in population) which occur during the year, and (the compensation) must be calculated on a year as a whole.' While the exact question we have was not presented or determined in that case the same principle as here involved was determined in accord with the trial court's opinion, and which, for the reasons stated, we approve."

In this case the Supreme Court of Kentucky approved the holding of the Missouri Supreme Court in the case of State v. Linville, 318 Mo. 698, 300 S. W. 1066, the holding in both cases being to the effect that since the prosecuting attorney or any elective officer was paid annually by an annual salary, an increase or decrease could not be made during the year but must only be increased or decreased at the beginning of any year which does not mean

the first of the incumbent's year. In the case of State v. Hamilton, 260 S. W. 466, par. 2, the court said:

> "Relator's term began on January 1, 1919, and ended on December 31, 1922. No law was passed between those dates which increased his salary. The whole difficulty, if there be difficulty in the case, arises out of the fact that clerks of circuit courts are not elected at presidential elections, but at what we call the off-year elections, whilst the act of 1915 fixed the method of determining the salary by presidential election dates and data. Were our circuit clerks elected in presidential years, there would not be before us the peculiar and rather difficult question we have in the instant case. This act of 1915 was in effect when relator was elected. Under it, relator's salary was fixed for his whole term, but was not in named dollars and cents for the whole term. The effect of this act of 1915 was to say to relator, 'Your salary shall be determined upon the presidential vote of 1916, until there is another presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the presidential vote.' The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So too, if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his elec-

tion) fixed for him a salary. True it was higher, but it was definitely fixed at the date of his election. If the act of 1915 had said that the circuit clerk of Crawford County, elected in 1916, shall receive $1,600 per year for the first two years, and $1,950 per year for the last two years of the term there would be no question. Section 8 of article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the act of 1915 as it now stands is no nearer a violation of section 8 of article 14 of the Constitution, than the supposed law. The lawmakers knew the presidential election years, and with this knowledge classified the counties as to salaries, and provided that such salaries should be determined by the last previous presidential vote. The salary of each class was fixed, and as said no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed too, at a time long prior to relator's election. In our judgment section 8 of article 14 of the Constitution does not preclude a recovery by relator. This because his salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note. The cases cited have no application to this state of facts. The exact question has never been ruled before. There is some language in King v. Texas County, supra, which might be construed to be in support of this ruling, but the question was not squarely at issue in that case."

In that opinion the court held that where the

salary of an officer was increased or decreased during his term of office by reason of being placed in a different bracket on account of an increase or decrease in the population of the county it was not a violation of Section 8, Article XIV of the Constitution which prohibits the increase of the salary of an elected officer during his term. It also held that if his county by a decreased population dropped to a lower class his salary was fixed and was fixed before his election although the change of class might give him a different amount. In the above case it was very noticeable that the court, in allowing the circuit clerk to take advantage of the raise in population, held that he was entitled to the raise or increase in salary for the last two years and did not apply the increase to any divided parts of his previous term year.

It will be noted that both of these sections classify the various counties for the purpose of payment of salaries on a population basis. This power is given by the Constitution of Missouri, Section 12, Article 9. Neither section contains any direction for ascertaining or computing the population. Formerly in this State there were many special laws concerning the determination of the population for the payment of salaries and fees of these two officials, and a general section, 11808. The Legislature of 1933 repealed all these special laws and the general section 11808 and enacted a new section 11808, which is now in effect and found in Laws of Missouri 1933, page 370, and is as follows:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

This section definitely fixes which census shall be used in determining the population of the counties for the purpose of paying salaries of the County officers -- the last previous decennial census for the payment of any

salary for any officer for any year. This would fix the salaries of these officers by the 1930 census for the year 1940, as it was the last previous decennial census.

Section 11314 R. S. Mo. 1929 provides for the payment of salary to Prosecuting Attorneys. This section, along with others in Article 2, Chapter 70, was repealed by the Legislature in 1933 and a new section 11314 enacted. This new section is found at page 178, Laws of Missouri 1933, and is as follows:

> "The prosecuting attorney shall receive for his services per annum, to be paid out of the County treasury * * the sum of: (Here follows the classification of counties and the salary bracket.) Provided, that until the expiration of the present term of office, the persons holding the office of prosecuting attorney shall receive the same compensation now provided by law. The number of inhabitants of any county, for the purpose of this section, shall be determined by the last decennial census of the United States."

This is a special section applicable to Prosecuting Attorneys and was enacted at the same Session of the Legislature which enacted Section 11808. It is not in conflict with that clause of Section 12, Article 9 of the Constitution which requires that "by a law uniform in its operation" the General Assembly shall provide for and regulate the fees of all county officers, as it applies uniformly to the Prosecuting Attorneys of the various counties. It will be noted that the last sentence of this section says: "The number of inhabitants of any county, for the purpose of this section, shall be determined by the last decennial census of the United States." It is necessary to determine what the Legislature meant when the words "per annum" in the first sentence and "last decennial census" in the last sentence were used.

Section 655 R. S. Mo. 1929 on the subject of

construction of statutes says, in part, as follows:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * *"

The word "annum" means year, and Webster's New International Dictionary defines "per" as "Through; by means of; through the agency of; by; for; for each". Applying this definition it seems obvious that it was the intention of the Legislature to fix the salaries of Prosecuting Attorneys by or through each year to be paid upon population classification determined by the last decennial census. The word "last" has a number of meanings; included in these are: "one before the present; final; following all the rest". In using the word "last" it must have been the intention of the Legislature to use the census which was final, or following all the rest. Since the census following all the rest at the beginning of the year 1940 was the 1930 census, it is the opinion of the writer that the salary of the Prosecuting Attorney should be based for the entire year of 1940 on the 1930 census.

This position is given strength by the fact that the Census Acts as now in force were in force when the present Section 11314 was passed, and the Legislature was charged with knowledge of its provisions and that its effective date was as of April 1st, 1940, and no provision or direction was made for changing of the classification for paying the salary during the year or upon the announcement or publication of the census reports. Also at the same Session was enacted the County Budget Law, which would have no effect in determining the salaries of officers, but, by Section 3 of this Act, found at page 342,

Laws of Missouri 1933, it is made the express duty of every officer claiming any payment for salary to furnish to the clerk of the county court, on or before the 15th day of January of each year an itemized statement of the estimated amount required for the payment of salaries. In making this estimate an officer could only use the census in effect on that date and this estimate could not be made upon the census which had not yet been taken and the results of which would be a matter of conjecture.

In the recent case of Gile vs. Buchanan County, 142 S. W. (2d) 665, l. c. 668, is found the following:

> "However, our conclusion is that a county's liability for a county officer's salary is incurred not just when each monthly installment thereof is payable, but, insofar as the constitutional provision herein invoked is concerned, the whole amount, due and payable during each year, must be considered from the beginning of the year. This must be true because the annual amount of such salary is fixed by the Legislature and no other officer or officers have authority to change it, either before or after it is due and payable. Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. 2d 857; State ex rel. Rothrum v. Darby, Mo. Sup., 137 S. W. 2d 532. Certainly such annual obligations imposed upon the county by the Legislature would be valid from the first of the year, if within the limits of the constitutional provisions fixing the county's authority to raise revenue during each year to pay them; and no part of any such obligation could become invalid merely because the county court decided to incur other obligations for different purposes during the year. To so hold would amount to recognition of authority in the county court to ignore statutes,

> and to say that it could make its own choice as to whether it would follow valid acts of the Legislature or use all of its revenue for different purposes. Therefore, while a part of the obligations incurred during the month of December may have been invalid, under the showing made, we hold that the county had imposed upon it a valid obligation to pay plaintiff the full salary which the Legislature provided should be paid to him for the year 1934; and that its showing is insufficient to prove that such obligation was void because of the constitutional provision invoked."

(The section of the Constitution referred to is Section 12, Article 10.)

While this case is not directly upon the point involved in your question the use of the above language, in a salary case, would add strength to the position that salaries of county officers are determined for the whole year at the beginning of the year and not subject to change by things occurring during the year.

CONCLUSION

The above opinion is in regard to whether or not the fiscal years of an officer's term could be divided and his salary be increased or be decreased before the beginning of his next fiscal year.

It is the opinion of this department that the circuit clerk, prosecuting attorney and other county officers affected by the decrease or increase of the population could only be paid in accordance with said increase or decrease at the beginning of the next fiscal year of his term after the population has been determined by the federal government, and that no increase be allowed or decrease be ordered before the first day of the fiscal year following the year of 1940.

II.

Another question that will arise in the case of decrease or increase of the population of any county is whether or not the office of circuit clerk and recorder of deeds should be combined when the population of the county is shown by the official census to be lower than twenty thousand (20,000).

Section 11534, Laws of 1933, page 361, reads as follows:

> "That in the event any person has been elected or may hereafter be elected to the office of recorder of deeds in a county in which the office is a separate office at the time of such election, such office shall remain a separate office for the entire term for which such person has been or may be elected."

The above section is unambiguous and for that reason the Supreme Court has not been called upon to construe that section. Under the section the office of recorder of deeds shall remain a separate office for that entire term for which such person has been or may be elected.

CONCLUSION

In view of this section it is the opinion of this department that since the office of recorder of deeds shall remain a separate office for the entire term for which such person has been or may be elected, then it is not affected by the decennial census of 1940 and by reason of this section the office of the circuit clerk shall remain separate and apart from the office of the recorder of deeds.

Respectfully submitted

APPROVED:

W. O. JACKSON
Assistant Attorney General

ROY McKITTRICK
Attorney General

W. J. BURKE
Assistant Attorney General

WJB:DA

MUNICIPAL CORPORATIONS: A city of the Fourth Class may issue bonds to erect a library building.

December 11, 1940

12-17

FILED
97

Hon. Carl E. Williamson
Prosecuting Attorney
Doniphan, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 5, 1940, in which you asked for an opinion upon the following question:

> "Does a City of the Fourth Class have the authority to levy bonds for the construction and maintenance of a Public Library?"

A city is a municipal corporation, and is created by a grant from the State, and to ascertain its powers it is necessary to look into the law under which it is created. The City of Republic v. Smith 139 S. W. (2d) 929, l. c. 932 is as follows:

> "Of course, relator has only such powers as are conferred upon it by the State. Such powers are found in Article 8, Chapter 38, Sections 6946 to 7090 inclusive, Revised Statutes of Mo., 1929, and amendments thereto, Mo. St. Ann. Sections 6946-7090, pp. 5714-5791."

This was an action by a city of the Fourth Class.

Section 6946 R. S. Mo. 1929, which is found in the article and chapter referred to in the above quotation, in enumerating some of the powers of cities of the Fourth Class, has among others the following clause:

> "* * *and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal it now owns or may hereafter acquire; * * *"

Section 7030 of the same article and chapter is as follows:

> "Bonds may be issued for erection or purchase of public buildings, bridges, waterworks, electric light plants and ice plants, public parks, and other improvements, and for establishing and maintaining a fire department. The board of aldermen shall have power to borrow money and issue bonds for the payment thereof, within the limits prescribed by the Constitution, for the purpose of erecting waterworks, electric light works, public parks and ice plants, or acquire the same by purchase; also a city hall and other public buildings and improvements and for furnishing the same, and for the erection of public bridges across streams dividing counties, if located within one mile of its corporate limits, the expense of building said bridges to be borne in part by the counties, as provided for by section 7903, R.S. 1929, but bonds for the purpose aforesaid shall not be issued until two-thirds (2/3) of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929."

In Article 10, of Chapter 38, which is a general act applicable to all cities and towns, is Section 7217, which provides as follows:

> "The various cities, towns and villages in this state, whether organized by special charter or under the general laws of the state, may contract a debt or debts in excess of the annual income and revenue for any such year, for any purpose authorized in the charter of such city, town or village, or by any general law of the state, upon the assent of two-thirds of the legal voters of such city, town or village voting at an election held for that purpose: Provided, such indebtedness so to be contracted shall not, with the existing indebtedness of such city, town or village, ex-

> ceed in the aggregate five per cent on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; and provided further, that the proper authorities of every such city, town or village incurring such indebtedness shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting same."

In the same article and chapter is Section 7218, which makes provision for the holding of an election for the purpose of submitting to the voters any proposition in accordance with the terms of Section 7217, and for publishing notice of such election. Section 7219 directs the form of ballot to be used at such election, and Section 7220 authorizes the board of aldermen to issue bonds on any such proposition as carried.

It will be observed that a city of the Fourth Class has power to purchase land; to erect a city hall and other public buildings; to issue bonds in excess of revenue provided for any one year, for the purpose of erecting a city hall and other public buildings, and to levy taxes at a rate higher than prescribed in Section 11, Article 10 of the Constitution for the purpose of paying such bonds and the interest thereon.

Section 11 of Article 10 of the Missouri Constitution limits the rate of taxes that may be levied by any city but authorizes an increase above the prescribed limit, for the purpose of erecting public buildings.

> "For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and

> two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor."

Section 12 of the same article of the Constitution limites the amount of indebtedness which a city may incur.

Inasmuch as cities have the power to erect buildings, it remains to be seen whether or not a public library would be within the contemplation of the law which confers authority for the erection of buildings. We find no decisions in this State where a legal meaning of these two words has been declared, but in Volume 35, Permanent Edition of Words and Phrases, at page 156, we find the following definition:

> "The term 'public library,' in 1 Rev. St. 388 Sec. 4, subd. 5, exempting every public library from taxation, includes the library of the American Geographical Society, which is kept by such society free and open to all. So long a the general public continue to have free access to this extensive and valuable library, surely it is practically, and to all intents, and purposes, a public library. Under such circumstances to criticise the library as but an incident to the relator's purposes would seem to be ungracious. The words 'public library' are not technical. They have acquired by judicial decisions no precise legal meaning. They are words of common use, and ought, therefore, as between the public, which is invited to a free enjoyment, and a disinterested society, such as the relator, to be interpreted as the are commonly understood. People v. Tax and Assessment Commissioner, N.Y., 11 Hun. 505, 507."

The Legislature is the proper judge of what is the proper purpose to which tax money may be applied. The General Assembly of Missouri in Article 5, Chapter 99 R.S. Mo. 1929, has recognized that the erection of a public library is a proper use of tax money, and provides in that article that cities, towns, and villages may upon certain conditions establish and maintain public libraries, and may erect buildings therefor.

CONCLUSION.

It is the conclusion of this Department that a city of the Fourth Class may issue bonds within the limits prescribed by the Constitution, for the purpose of erecting a public library building, but we find no authority to use the proceeds of the bonds for the purpose of establishing or maintaining the library.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

WOJ/mc

STATE TREASURER: Disposition of certain moneys paid into state treasury.

January 2, 1940

F3

FILED
98

Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Dear Mr. Winn:

This will acknowledge receipt of your letter of December 29, 1939, which reads as follows:

> "This office is in receipt of a draft Treasurer of the United States in the amount of $1,549.55, with the following information:
>
> "'On account of payment due the State of Missouri of 25 per cent of the receipts from leases of Flood Control Lands pursuant to the provisions of the Act of June 28, 1938, (52 Stat. 1220) Chief of Engineers Reference 7510 (L Miss. R)
>
> "21 x 6090 payments to States, Flood Control Act, June 28, 1939.
>
> "Of the total amount $1,841.65 due, the sum of $292.10 is withheld on account of indebtedness to the State of Missouri in the amount of $292.10 for taxes unlawfully collected on gasoline purchased by Federal employees traveling within the State of Missouri for use in the exercise of governmental functions.
>
> "We also received today a draft from the Treasurer of the United States in the amount of $2.81 with the following information:

"'On account of five per cent of the net proceeds derived from the sale of Public Lands, within the State of Missouri, during the fiscal year ended June 30, 1937, due the State in accordance with the provisions of the Act of March 6, 1920. (3 Stat. 545) Department of the Interior General Land Office.

"1490511 payment to the States of five per cent of proceeds from sales of Public Lands (Receipted Limitation) 1939

"We respectfully ask an opinion from your office as to what fund these drafts should be credited."

I.

RECEIPTS FROM LEASES OF FLOOD CONTROL LANDS.

At page 1221, Vol. 52, United States Statutes at Large, is found the following provision:

"In the event the United States acquires or owns title to any lands in fee simple under the provisions of the Act of May 15, 1928, as amended and supplemented, the United States may retain the ownership thereof, or any part thereof instead of turning over such lands to the ownership of States or local interests as provided in section 4 of said Act of May 15, 192 8, and may lease such lands: Provided, That 25 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of such leases shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legis-

> lature may prescribe for the benefit of the public schools and public roads of the county or counties in which such property is situated: Provided further, That when such property is situated in more than one State or county the distributive share to each from the proceeds of such property shall be proportional to its area therein: * * *"

It will be seen from the above that the draft for $1,549.55, which represents receipts from leases of flood control lands in this state, is earmarked by Congress for use of the public schools and public roads of the county or counties in which such leased property is situated. We assume that you can ascertain from the Chief of Engineers as to what county or counties this leased land is in and what proportion of it is in each county. If you ascertain that all of the leased land is in one county, you should open up an account to the credit of the public schools and public roads of that county and credit said account with the proceeds of this draft. If you find that the land lies in more than one county, you would have to determine the proportionate part to which each county was entitled on the basis of the ratio the amount of leased land in each county bears to the total amount of leased lands represented by this draft, and open up accounts for each county accordingly. The legislature of Missouri would then appropriate this account or these accounts to the use of the public schools and public roads of the respective counties.

We might suggest in this connection that the proceeds from the leased lands in question are earmarked for a particular purpose, and we know of no authority by which the Treasurer of the United States could take any part of these proceeds and apply same to any other purpose. We, therefore, think that the deduction of $292.10 from the amount of the proceeds is irregular, and we suggest that you make a demand of the Treasurer for a payment of said deduction also.

CONCLUSION

It is, therefore, the opinion of this office that the draft for $1,549.55, representing 25 per cent of the receipts from leases of flood control lands pursuant to the provisions of the Act of June 28, 1938 (52 Stat. 1220), should be credited to the public schools and public roads of the county or counties in which said leased lands lie in proportion to the ratio which the acreage of said leased lands in any county bears to the total amount of leased lands represented by said payment.

II.

RECEIPTS FROM SALE OF PUBLIC LANDS.

The draft for $2.81 referred to in your letter represents receipts from the sale of public lands pursuant to the provisions of an Act of March 6, 1920.

At page 547 of Vol. 3, United States Statutes at Large, is found the following provision of said Act of March 6, 1920:

> "Third. That five per cent of the net proceeds of the sale of lands lying within the said territory or state, and which shall be sold by Congress, from and after the first day of January next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three fifths shall be applied to those objects within the state, under the direction of the legislature thereof; and the other two fifths in defraying, under the direction of Congress, the expenses to be incurred in making of a road or roads, canal or canals, leading to the said state."

While the foregoing law provides that the draft in question should be applied for making public roads and canals, yet we think that since the construction of canals is no longer a program or activity in this state and any money set aside for that purpose would ultimately not be used, all of said money should be applied to the making of public roads. That being true, the draft in question should, in our opinion, be credited to the state road fund in accordance with Section 8147, page 320, Laws of 1931, which reads in part as follows:

> "There is hereby created a state road fund which shall receive all monies from the sale of bonds and all monies given the state by the United States government for road purposes and the balance transferred from the state road bond interest and sinking fund as provided in section 8145 of this article."

CONCLUSION

It is, therefore, the opinion of this office that the draft for $2.81, representing the net proceeds derived from the sale of public lands within the state of Missouri during the fiscal year ending June 30, 1937, due the state in accordance with the provisions of an Act of March 6, 1920 (3 Stat. 545), should be credited to the state road fund.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

HHK:HR

SALARIES AND FEES: Salary of the Clerk of the Circuit Court
CIRCUIT CLERKS: of Jackson County is fixed by Section 11820, R. S. Missouri 1929.

January 4, 1940

1-5

FILED
98

Mr. Maurice H. Winger
Acting Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This is in reply to your letter of December 21, 1939, in which you request an additional opinion from this department on the question of the salary of the Clerk of the Circuit Court of Jackson County, Missouri. In your request you refer to our opinion dated September 16, 1939, on this same subject matter written to Mr. William Goodman, Assistant Attorney General, by the writer of this opinion.

For your reason for the additional request you call our attention to the salary act of county officers in counties of 350,000 to 750,000 as amended, Laws of Missouri, 1935, pages 346 and 347, and particularly call our attention to Section 2 of the Act which provides that all acts or parts of acts in conflict with the Act of 1935 are repealed.

As stated in our opinion of September 16, 1939, we found that statutes applicable to salaries of county officers have been changed and amended and as a result thereof, on account of conflicts in the statutes, it is difficult to determine just what statute applies in some cases. We think the above statement is particularly applicable to the salaries of clerks of circuit courts in this state.

It will be noted that the Act of 1935, page 347, is an amendatory act of the Act of Missouri found in Laws of Missouri, 1933 at pages 373 and 374. From Section 1 of the 1935 Act it will be noted that the purpose of that amendment was to amend the general salary act as it applied to the salary of the county

counselor and change it to Six Thousand Dollars per annum instead of Three Thousand Dollars per annum. This seems to have been the only change which was made in the general salary act as it applies to the county officers therein named. You call our attention to Section 2 of the 1935 Act which provides, "that all acts or parts of acts in conflict therewith are hereby repealed." We gather from your reference to this particular section that you take the view that if there is any act in conflict with said Section 11833, then that act is repealed. Section 11820, R. S. Missouri 1929, provides as follows:

> "In all counties and cities not within the limits of a county having a population of three hundred thousand inhabitants or more, or such as may hereafter have three hundred thousand inhabitants or more, the clerk of the circuit court of such county or city may retain, out of the fees received by him as such clerk, an amount not exceeding the sum of five thousand dollars per annum for his services as such clerk."

We find in the case of State of Missouri ex rel. Baker, Attorney-General, v. Fiala, 47 Mo. 310, at 320, where such a provision as Section 2, supra, was considered by the Supreme Court and also where the question of whether a statute was repealed by implication. In that case the court said:

> "Repeals by implication are not favored. The rule in this State may be regarded as settled that a general statute, although inconsistent with the provisions of a prior local law, will not repeal the latter unless there is something in the general law, or in the course of legislation upon its subject-matter, that makes it manifest that the Legislature contemplated and intended a repeal.

* * * * * * * * * * * * * * * * *

"But the act of March, 1870, contained an affirmative repealing section in these words: 'All acts and parts of acts in conflict with this act are hereby repealed.' Do these words spend their force upon inconsistent general laws? or do they, in one breath, sweep away all conflicting local legislation as well? It would be dangerous, to say the least of it, to hold the affirmative of the latter proposition in a State where special legislation has abounded as it has in the State of Missouri. The repealing clause must be construed in connection with the whole act, and with reference to the intention of the Legislature in enacting it. The same rule of construction is to be applied to it that is applied to the main body of the act. The word 'repealed' is not necessarily to be taken in its most sweeping and absolute sense. In Rex v. Rogers, Lord Ellenborough says: 'This word is not to be taken in an absolute, if it appear upon the whole act to be used in a limited sense.' (10 East, 573; and see Canndon v. Anderson, 1. T. R. 723; Sedgw. Stat. and Const. Law, 129.) The whole act, then, is to be consulted to determine the proper construction to be placed upon the repealing clause, however comprehensive the terms may be in which that clause is phrased. This is a doctrine of common sense as well as of the law."

As stated in the Fiala case, supra, it would be dangerous to say the least of it, to hold that such a repealing clause in one breath would sweep away all

conflicting local legislation, especially where there is so much special legislation in this state on different subjects. In paragraph three of the syllabus to the Fiala case it is said that such a repealing clause in terms repeals acts and parts of acts in conflict with it, refers only to general inconsistent laws. So if the 1935 Act is a general section on salaries of county officers, then it would only repeal general acts which are in conflict with it following the rule announced in the Fiala case. Therefore, we do not think that Section 2 of the 1935 Act would be pertinent to the question here or have any effect upon Section 11820 if said Section 11820 is a special act pertaining to salaries of clerks of the circuit courts in counties of 300,000 or over. In the case of State ex rel. McDowell, Inc., v. Smith, 334 Mo. 653, the court had under consideration the county budget law and the State Highway Act. The question there involved was whether the State Highway Act and the officials acting under that act were subject to the provisions of the county budget act when purchases for supplies were made by the State Highway Department. In that case the court held that the highway act was a special act and that the purchasing agent act was a general act. At l. c. 669 the court, in referring to the highway act, said:

> "* * * * The act is a special law; a complete, well-rounded harmonious whole, relating to a single homogeneous enterprise that was designed by the people and furthered by the Legislature to 'get Missouri out of the mud.' Notwithstanding this well-designed, practical and complete scheme, with its checks and balances, in the form of audit supplemented with reports required to be made to the Governor and to the Legislature, did the General Assembly intend or undertake by the Purchasing Agent Act to interfere with and supplant that scheme in the matter of purchases of road material for highway

> construction, by requiring such purchases, and their incidents, to conform to and be governed by this later act, which is a general statute? To this question, the last to be determined, we now address ourselves.
>
> "The Purchasing Agent Act discloses on its face that it was intended to apply to some extent to the State Highway Commission, as the commission is specifically mentioned in the provision which requires that one of its members in conjunction with representatives of other designated departments and institutions act with the state purchasing agent in the adoption and promulgation of certain standards relative to supplies. Also, the commission is referred to by necessary implication elsewhere in the act. Granting that, we are in this proceeding concerned with only the effect of the act with respect to its operation vel non upon the purchases by the commission of materials for use in road construction, as only such are involved in the claim in suit."

The court, in stating applicable and controlling subsidiary rules of interpretation of general and special statutes, said:

> "'It is the established rule of construction that the law does not favor repeal by implication but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the

> other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.' (1 Lewis-Sutherland Stat. Const. (2 Ed.), sec. 274, pp. 537-539. See, also, State ex rel. Rutledge v. School Board, 131 Mo. 505, 516, 33 S. W. 3; Manker v. Faulhaber, 94 Mo. 430, 440, 6 S. W. 372.)
>
> "'In many of the cases just cited (under the passage quoted, supra) there was a general repeal of all inconsistent acts and parts of acts. As a general rule the insertion of this general repealing clause does not add anything to the effect of the general act to repeal local or special laws.' (Lewis-Sutherland, supra, p. 529.)
>
> "The same text states in Section 275: 'The general law can have full effect beyond the scope of the special law, and by allowing the latter to operate according to its special aim, the two acts can stand together. Unless there is a plain indication of an intent that the general shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly.'"

Following the rules announced in the Smith case, supra, then unless the Act of 1935, page 347, shows a clear intention to repeal said Section 11820 if it is a special statute, then said Section 11820 will continue

to have effect and the general words in the 1935 Act with which it conflicts will be restrained and modified accordingly.

Section 11833 of the 1935 Act, pages 346 and 347, provides as follows:

> "Salaries of officers in certain counties.--On and after January 1, 1933, the following salaries shall be paid the hereinafter named officers of all counties in this state which now contain or may hereafter contain a population of three hundred fifty thousand and less than seven hundred fifty thousand, viz: Sheriff, five thousand dollars; collector of revenue, four thousand dollars; treasurer, four thousand dollars; county counselor, not exceeding six thousand dollars; prosecuting attorney, five thousand dollars; recorder of deeds, three thousand dollars; clerk of county court, three thousand dollars; clerk of circuit court, three thousand dollars; coroner, three thousand dollars; assessor, three thousand dollars; county surveyor and bridge commissioner, three thousand dollars. Such salaries to be paid in monthly installments on the first day of each month: Provided, however, that the salary of the county surveyor or bridge commissioner, and the salary of the prosecuting attorney in counties having a population of two hundred thousand inhabitants and less than three hundred thousand inhabitants, shall be three thousand dollars and five thousand dollars, respectively, per annum, payable in equal monthly installments on the first day of each month."

By a comparison of Sections 11820 and 11833, supra, it will be seen that both sections include the salary of the clerk of the circuit court in counties of 350,000 to 750,000.

From the rules announced above, the question of whether or not said Section 11820 is repealed by implication by the provisions of Section 11833, would depend upon whether said Section 11833 is a general salary act applicable to all county officers therein named and whether said section 11820 is a special salary act applicable to the salary of the clerk of the circuit court in counties of 300,000 or over. In order to determine this question, we think it is necessary to review the salary legislation of county officers and circuit clerks from the time that the lawmakers had such officers and their salaries under consideration. As stated above, the purpose of the amendment of the salary Section 11833 in 1935 was to change the salary of the county counselor and carry the other general provisions of the old act with it.

In 1933 at page 373, the general salary act of 1931, page 323, was repealed and reenacted. In the 1933 Act the treasurer and county counselor were added and the marshal was omitted so that seems to have been the purpose of the repeal and reenactment of the general salary act in 1933.

Then going back to 1931, Laws of Missouri 1931, page 323, which was to repeal Section 11833, R. S. Missouri 1929, it will be seen that the purpose of this amendment was to change the brackets as to the population of counties to which this general act applied so that it would include counties of a population from 350,000 to 750,000. It will be noted that none of these changes in said Section 11833, R. S. Missouri 1929, referred in any manner to said Section 11820.

Section 11833 was originally enacted in 1893, Laws of Missouri, 1893, page 168. In the original act

various county officers and their salaries were included including the office of the clerk of the circuit court. The counties to which this act was originally intended to apply were those which contained a population of 100,000 and less than 300,000.

In 1901, Laws of Missouri, 1901 at page 175, this act was amended so that it applied to officers therein named in counties containing a population of 150,000 and less than 300,000.

In 1907 this act was amended so that it applied to officers therein named in counties of 150,000 and less than 500,000. Said Section 11833, R. S. Missouri 1929, as originally passed in 1895 and as amended down to this time has not at any time referred to said Section 11820, supra.

We will now review the history of said Section 11820, R. S. Missouri 1929. It seems that this law was originally passed in 1877, Laws of Missouri 1877 at page 255. Section 1 of the Act is as follows:

> "Section 1. That in all counties (and cities not within the limits of a county) having a population of three hundred thousand inhabitants or more, the clerk of the circuit court of such county or city may retain, out of the fees received by him as such clerk, an amount not exceeding the sum of five thousand dollars per annum for his services as such clerk."

In the revision of 1879, R. S. Missouri 1879, Section 5632, the foregoing section, which is applicable to the circuit clerks in counties of 100,000 or more, was combined with a section which is applicable to clerks of courts having criminal jurisdiction. That part of said Section 5632 of 1879, which is applicable to clerks of criminal courts, is now Section 11821,

R. S. Missouri 1929 with some changes.

In 1887 the General Assembly, in Laws of Missouri, 1887, page 192, reenacted the provisions of the circuit clerk act in counties of 300,000 or more and the act, as amended, included the same provisions as said Section 11820, R. S. Missouri 1929 now contain. This act also required the circuit clerk and criminal clerk to make a return and report of their fees to the county treasurer. The Act, as so amended, was carried into the revision of 1889 as Section 5015, R. S. Missouri 1889.

In 1895, Laws of Missouri, 1895 at page 178, this circuit clerk and criminal clerk act was again before the General Assembly and it was amended and reenacted carrying forward the same provisions as to the circuit clerk which were contained and are now contained in said Section 11820, R. S. Missouri 1929.

The said circuit clerk act, as amended, was placed in the revision of 1899 at Section 3271. In 1905, Laws of Missouri, 1905, page 154, the General Assembly again had the law pertaining to clerks of circuit courts in counties of 300,000 or more before it and reenacted the law which was then in existence as it applied to the circuit clerk, and that same provision of the law is now in Section 11820, R. S. Missouri 1929. This Act of 1895, referred to above, was carried into the revision of 1909 as Laws of Missouri, 1909, Section 10727.

In 1911 this act was again before the lawmakers, Laws of Missouri, 1911, page 386, and by that act the law, as it pertained to circuit clerks and criminal clerks in counties of 300,000 or over, was separated. The provisions of Section 11820, R. S. Missouri 1929, were placed in Section 10727 of Laws of Missouri, 1911 at page 386, and the provisions of what is now Section 11821, R. S. Missouri 1929, were placed in Section 10727a of the Act of 1911, page 386. This is the first time that we find where the act pertaining to salaries of circuit clerks and criminal clerks in counties of 300,000 or over was separated.

The Act of 1911, supra, was carried into the revision of 1919, Section 11028, in the same language that Section 11820, R. S. Missouri 1929, now appears.

We are further fortified in our views that the provisions of Section 11833 of Laws of Missouri, 1935, at page 347, are intended to be general and not apply to salaries of clerks of circuit courts in counties of 300,000 or over for the reason that in 1907, Laws of Missouri, 1907, page 420, this general salary act was amended to include counties containing a population from 150,000 to 500,000. Then the Legislature came along in 1911 and at that time had under consideration the provisions of Section 11820 which only applied to the salaries of circuit clerks in counties of 300,000 or over and reenacted that legislation in its act of that year, Laws of Missouri, 1911, page 386. We must assume that the lawmakers took notice of the general act of 1907, page 420, supra, as it applied generally to county officers, but when they enacted the law of 1911, page 386, wherein they separated the law as it applied to clerks of circuit courts and clerks of criminal courts in counties of 300,000 or over, intended that this act be a special act applicable to such officers.

It is our understanding that the administrative officers of Jackson County have, for many years, considered the provisions of said Section 11820 in full force and effect and applicable to the salary of the Clerk of the Circuit Court of Jackson County, Missouri. While the courts are not bound by the construction placed on a statute by the administrative officials, yet such a construction should be given some consideration. This rule is announced in 59 C. J. 1037, and in the cases of In re Graves, 30 S. W. (2d) 149, 154; State v. Fendorf, 296 S. W. l. c. 789 (5).

Since 1911 when said Section 11820 was repealed and reenacted, Laws of Missouri 1911, page 386, there have been three revisions of the statutes of Missouri, that is, 1919, 1929 and 1939, and it is significant that the lawmakers have seen fit to carry said Section 11820 into the Revised Statutes at each of these

revisions and even since the amendments to Section 11833, R. S. Missouri 1929, which took place in 1931, 1933 and in 1935. The lawmakers in 1939 apparently considered that said Section 11820 had not been repealed by implication by said Section 11833 or any of its amendments thereto. The fact that Section 11820, R. S. Missouri 1929 has been carried through these revision sessions strongly indicates that the lawmakers have treated this section as a special act applicable to the salaries of clerks of the circuit courts in counties of 300,000 or more, and for that reason it has been brought forward as the law.

From a study of the history of the legislation pertaining to the office of clerk of the circuit court and the general salary statutes hereinbefore referred to, we are satisfied that Section 11820 is a special act pertaining to the salaries of clerks of circuit courts in counties of 300,000 or more and that the provisions of Section 11833, R. S. Missouri 1929, as amended by Laws of Missouri, 1935 at page 347, is a general section pertaining to all county officers, and that the provisions of said Section 11820 have not been repealed by implication by said Section 11833, or any of the amendments to that section.

CONCLUSION.

From the foregoing it is the opinion of this department that the salary of the Clerk of the Circuit Court of Jackson County should be determined and paid in accordance with the provisions of Section 11820, R. S. Missouri 1929.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

STATE TREASURER) Amounts received from forfeited bonds of retail
LIQUOR BONDS) liquor dealers belong to county public school funds.

January 4, 1940

FILED
98

Hon. Robert W. Winn
State Treasurer
Jefferson City, Missouri

Att: Mr. Dyas B. Hulse, Chief Clerk

Dear Sir:

We have received your recent letter which reads as follows:

> "We are in receipt of draft in the amount of $26,000.00, drawn on the account of the Reserve Mutual Casualty Company, signed by Joseph J. McGee, Treasurer.
>
> "This check according to your letter of transmittal seems to be in settlement of certain liquor bond suits. We respectfully ask an opinion from your office as to just what fund this draft should be credited to."

The funds in question, as you have outlined, were received from the Reserve Mutual Casualty Company as surety on certain forfeited bonds of retail liquor dealers licensed to sell liquor by the drink, because of violations of the liquor laws by the dealers who were principals in such bonds.

The Supreme Court of Missouri, en banc, in the recent case of State of Missouri v. Wipke, 133 S.W. (2nd) 354, held that the bonds required of retail liquor dealers selling liquor by the drink are forfeiture bonds and that the full amount thereof, that is, $2,000.00, is recoverable as a forfeiture when the liquor laws are

breached by the principal. The court said at l.c. 358:

> "In this case we think the damage recoverable is the face of the bond; it was required and given to secure performance by means of a forfeiture, and for that reason it is an aid to the State in enforcing its laws."

Section 8 of Article XI of the Constitution of Missouri provides that the clear proceeds of all fines, penalties and forfeitures shall be paid into the county public school funds in the several counties. This section reads in part as follows:

> " * * * the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, * * * shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund;* * * ."

Since the Supreme Court has held that such bonds are "required and given to secure performance by means of a forfeiture", and since the Constitution provides that the clear proceeds of all "forfeitures" shall belong to and be securely invested and sacredly preserved "in the several counties as a county public school fund", it appears to definitely follow that the funds in question belong to the school funds of the several counties.

There are several cases which present analogous situations. In Railroad v. Gildersleeve, 165 Mo. App. 370, the defendant had been forbidden by a writ of injunction from engaging in a certain kind of business. The defendant was later cited to show cause why he should not be punished for contempt for violating the terms of the

injunction. After a hearing, he was adjudged in contempt for violating the terms of the injunction, and sentenced to serve fifteen days in jail. From this order sending him to jail, the defendant appealed. For the purpose of obtaining a supersedeas, the defendant executed a recognizance with surety in the amount of $500.00. It was the usual from of bond used in appeals in civil cases providing in substance that if the defendant shall prosecute the appeal with due diligence and shall perform the judgment of the appellate court, then the bond should be void, otherwise to remain in full force and effect. The contempt proceedings were affirmed by the appellate court and the defendant could not be found. The lower court, after a hearing, then entered judgment on the appeal bond against the surety, and from that judgment, the surety appealed. In holding that this latter appeal was civil in nature and not a criminal appeal, and further that the net proceeds of the forfeited appeal or surety bond belonged to the county school fund because of the above mentioned constitutional provision, the court said at l.c. 375:

> "It is to be conceded, too, that the appeal of Gildersleeve (the defendant) from the judgment sentencing him to jail for contempt involved a civil controversy, for such has been expressly decided by the Supreme Court, touching the identical matter. After Gildersleeve prosecuted his appeal here, a preliminary rule in prohibition was issued against this court by the Supreme Court, on the theory that an appeal would not lie from an adjudication of contempt. On considering that matter, the Supreme Court determined that the adjudication for contempt under which Gildersleeve was sentenced to jail was ancillary to the main case in equity for an injunction, and that, therefore, the statute authorizing appeals in civil

> cases obtained to the extent of warranting the appeal of Gildersleeve, the contemnor. * * * * * * * * * * * *
>
> "The recognizance was entered into with full knowledge of our constitutional provision touching forfeitures and this provision essentially entered into the obligation as a silent factor. Under the provisions of section 8, article 11 of our Constitution, the clear proceeds of all penalties and forfeitures shall belong to the several counties as a public school fund. The city of St. Louis is to be regarded as a county within this provision and forfeitures therein by whomsoever collected are held in trust for the school fund of such city. (See In re Staed, 116 Mo. 537, 22 S.W. 859; Fiedler v. Bambrick Bros., 162 Mo. App. 528, 142 S.W. 1111.)"

The case of Gross v. Gentry County, 8 S.W. (2nd) 887 (Supreme Court of Missouri, en banc), was a suit brought by a surety on a judgment rendered on a forfeited recognizance. The surety admitted liability and the purpose of the suit was to determine ownership between two counties of the sum of money paid into court by the surety. It appeared that one Gross was charged by indictment in the Circuit Court of Atchison County with a felony. He applied for a change of venue and the case was sent to Gentry County. After the granting of the change of venue, he entered into the recognizance in question in the Circuit Court of Atchison County with the plaintiff herein as surety. Gross failed to appear in the latter court and the question was which county was entitled to the forfeiture. In holding that all proceedings to collect the proceeds of such bonds were civil in nature and were merely suits to enforce the surety's contract with the state, and further that the clear

proceeds of such bond forfeitures belonged to the county public school fund (in one of the counties), the court said at l.c. 890:

> "If an action had been rendered necessary to enforce the payment of the surety's liability, it would not have partaken of the nature of a criminal proceeding, although having its origin in a prosecution for a crime. It would simply have been an action by the state on a forfeited recognizance which did not involve the guilt, innocence, conviction, or acquittal of any person. It would, in short, have been a suit to enforce the surety's contract with the State, executed by the former when the recognizance was entered into. Possessing this characteristic, its determination must rest largely upon the principles of the law applicable to suits on contracts, rather than the laws in regard to criminal prosecutions. The invoking of the latter may be authorized so far as they may throw light on the ownership of the fund, but not as finally determinative of that matter. The fact that the surety admitted his liability and paid the money into court, thus obviating the necessity of an action, does not affect the nature of the proceeding nor clarify the situation in determining the ownership of the forfeited fund. State v. Gross, 306 Mo. 1, 275 S.W. 769; State v. Wilson, 265 Mo. loc. cit. 9, 175 S.W. 603; State v. Streutker (State v. Carroll), 288 Mo. 156, 231 S.W. 565; State v. Hoeffner, 124 Mo. 488, 28 S.W. 1; State v. Heed, 62 Mo. 559.
>
> "If it were permissible to reason by analogy from the Constitution and

> statutes prescribing the manner of the disposition of such a fund in a county in which no change of venue has been taken, little difficulty would be encountered in determining that its ownership is in Atchison county. The Constitution (section 8, art. 11) prescribes that the 'clear proceeds of all penalties and forfeitures * * * shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund.' The 'several counties' referred to must, in reason, mean the counties in which the proceedings were had out of which the funds originated. While suits for the recovery of penalties and forfeitures are required to be brought by the state because the obligation is made to the state, the amounts recovered belong to the counties, and it would involve an unnecessary formality upon their recovery to require them to be paid into the state treasury and subsequently apportioned to the counties."

It appears, therefore, that the proceeds of forfeited surety bonds given to the state belong to the county public school funds because of the constitutional provision. The Constitution provides that all "forfeitures" shall be so disposed of, whether obtained from forfeited surety bonds or otherwise. The Supreme Court, as shown above, has held that the surety bonds of liquor dealers selling liquor by the drink are forfeiture bonds. Therefore, it follows that such proceeds go to the county school funds.

In Gross v. Gentry County, supra, the Supreme Court, en banc, held also that the provisions of Section 8, Article XI of the Missouri Constitution, are self-enforcing. In this connection, the court said at l.c. 889:

> "Incidentally it may be said that, since the adoption of section 5 of article 9 of the Constitution of 1865, which was continued in force in section 8 of article 11 of the Constitution of 1875, the legal necessity of the enactment of statutes directing the disposition of funds arising from fines, penalties, and forfeitures has not existed, except to give formal legislative recognition to the constitutional provision in regard thereto. This provision is affirmative in its nature and direct in its terms; it consists simply in a mandatory declaration as to the disposition that is to be made of the public funds designated, and is self-executing. State ex inf. Barker v. Duncan, 265 Mo. 26, 42, 175 S.W. 940, Ann. Cas. 1916D, 1, and cases; McGrew v. Railroad, 230 Mo. 496, 546, 132 S.W. 1076."

CONCLUSION.

It follows, therefore, that the amounts received by the state from forfeited surety bonds of retail liquor dealers selling liquor by the drink belong to the county public school funds of the counties in which the violations of the liquor laws occurred.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

COUNTY COURT: Returning of taxes, by the County Court,
REFUNDS: under illegal levy.
TAXATION:

February 13, 1940.

2-14
FILED
98

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Withers:

This office is in receipt of your letter of February 10th, in which you ask for an opinion upon the following matters:

> "The Birmingham Drainage District, a corporation under the drainage district law, located in Clay County, Missouri, has presented to the County Court of Clay County, Missouri, a petition for a return of certain taxes paid by the District.
>
> "Since the action which may be taken by the Court on this petition would be subject to a review under the general county audit and therefore guided by your opinion I would appreciate your opinion concerning the proper action for the Court to take under the following facts:
>
> "On June 1st, 1938, the said Birmingham Drainage District was the owner of certain real estate in Clay County, Missouri, purchased under a foreclosure of tax liens due the District in former years. As of the date of June 1st, 1938, said lands were assessed for state, county, school,

> special road, road & bridge, and courthouse building taxes based upon said ownership on June 1st, 1938, for taxes due in the fall of 1939, and said taxes were levied and extended on the tax books and paid by the District on December 18, 1939.
>
> "The District states that the nontaxability of these lands were overlooked by the assessor, the county court and the District.
>
> "The taxes so paid have been distributed as to the portions paid to the state, schools and special road districts, but the District alleges that there is yet within the control of the Court the county tax, the road & bridge tax, and the courthouse building tax and prays that such taxes so in the control of the Court be returned to the District. The payment was not under protest.
>
> "Should the prayer of this petition be granted?"

Section 6, Article X, of the Constitution of Missouri, provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. * * * "

Under the decision of the Supreme Court in the case of Grand River Drainage District vs. Reid, 111 S. W. (2nd) p. 151, land which the drainage district acquired to protect its lien for taxes, comes under this exemption and

and would not become subject to taxation while so held. The tax levy based on the assessment of the year 1938 for taxes due in 1939, for this reason, was an illegal levy and void.

Section 9981 R. S. Mo. 1929, provides as follows:

> "Wherever, in any county in this state, money has been collected under an illegal levy, the county court of such county or counties is hereby authorized to refund the same by issuing warrants upon the fund to which said money had been credited, in favor of the person or persons who paid the same as shown by the collector's books: Provided, that should the person in favor of whom any warrant or warrants are issued be dead or unable to appear in person, then the same shall be paid to his heirs or legal representatives: Provided further, that said county court or courts may, in their discretion, refund, in addition to the money collected, interest which may have accrued upon the same, not to exceed six per cent. Provided further, that before any levy shall be considered illegal, it shall have been so declared by the supreme court of the state of Missouri: Provided further, that the provisions of this section shall only apply to those counties in which the money collected under said illegal levy is either in the county treasury or within the control of the county court: * * * " (Last underscoring ours)

Under your statement of facts, the payment of this illegal tax was a voluntary payment. The rule of Missouri regarding the voluntary payment of an illegal tax is set out in the case of Brewing Co. v. St. Louis, 367 Mo. l. c. 376, as follows:

"It is a well-settled rule of law that money paid through a mistake of fact, may be recovered in an action for that purpose. (15 Am. and Eng. Ency. Law (2 Ed.), p. 1103, and cas. cit.) But this rule is subject to the qualification that the party paying must make the payment under a bona fide belief that the money is due. For if he did not believe he owed the money at the time he paid it, he can not recover it. (Idem, p. 1105.)

"This rule applies to payments to municipal corporations as well as to individuals. (20Am. and Eng. Ency. Law (2Ed.), p. 1158, and cas. cit.) But in all such cases the mistake must be one of fact and not of law, for all persons are deemed to have notice of the law. (Ibid.) An analysis of the cases relied upon by the plaintiff shows that they follow this rule, or else that there was an element of duress in the payment.

"The rule stated has been uniformly followed in this State in reference to all kinds of payments, including taxes, licenses, and claims, and the doctrine is firmly established that payments made with a full knowledge of all the facts constitute voluntary payments and can not be recovered, and that mistake or ignorance of law gives no right to recover. (Walker v. St. Louis, 15 Mo. l. c. 575; Christy's Admr. v. St. Louis, 20 Mo. 143; Claflin v. McDonough, 33 Mo. 412; Couch v. Kansas City, 127 Mo. 436; Teasdale v. Stoller, 133 Mo. 645; Douglas v. Kansas City, 147 Mo. l. c. 437; see, also, 22 Am. and Eng. Ency. Law (2 Ed.), pp. 609 and 613.)"

CONCLUSION

Therefore, it is the opinion of this department that the payment of the tax by the drainage district, having been made voluntarily, absent a ruling by the Supreme Court, a safe action for the county court is to refuse to grant the prayer of the petition.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

WOJ:LB

SCHOOL DISTRICTS: Common school districts may change site only at annual meeting.

May 25, 1940

5-27

FILED
98

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated May 21, 1940, which reads as follows:

> "Big Shoal School District No. 63 in Clay County, Missouri now has three school buildings, all used as common schools, and located some distance away from the center of the district. This is a common country school district, and these schools are elementary schools.
>
> It is the desire of the school board and probably most of the voters that these three separate schools be abandoned and a single school erected closer to the center of the district.
>
> Can the situs of these schools be legally changed from the three locations now existing to the single proposed school by a vote of the district at a special meeting called by the board?"

The only provision in our statutes bearing directly on the manner of changing the location of a schoolhouse site is Section 9284, R. S. Mo. 1929, the pertinent part of which is as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:
>
> * * * * * * * * * * * * * * * * * * *
>
> Eleventh--To change the location of schoolhouse site when the same for any cause is deemed necessary: Provided, that in every case a majority vote of the voters who are resident taxpayers of said district shall be necessary to remove a site nearer the center of said district; but in all cases to remove a site farther from the center of said district, it shall require two-thirds of the legal voters who are resident taxpayers of such school district voting at <u>such election</u>."

It is evident from reading the entire school laws that the legislature intended the more important transactions relating to the schools to be decided at the annual elections. An exception to this rule is found in Section 9227, R. S. Mo. 1929, which provides that an increase of the tax levy for maintaining schools or for erecting or repairing schoolhouses may be made at a special meeting held for that purpose.

Section 9228, R. S. Mo. 1929, is a general section authorizing special meetings, and is in part as follows:

> "Special school meetings for the transaction of business authorized by this chapter, and not restricted to the annual meeting or otherwise provided for, shall be called by the board when a majority of the qualified voters of the district sign a petition requesting the same, and designating therein the purpose for which said meeting is desired."

In this section the only matters which may be acted upon at a special meeting are those which are not restricted to the annual meeting, as set out in Section 9284.

In Section 9215, R. S. Mo. 1929, we find the following:

> "Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors, or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way in article 2, chapter 7, R. S. Mo. 1929, and upon such condemnation and the payment of the appraisement, as therein provided, the title of said lot or land shall vest in the board of directors or board of education aforesaid for use in trust for the district and the purposes for which the same was so selected and located. All laws or parts of laws in conflict with this law are hereby repealed."

This section was discussed in Gladney et al. v. Gibson et al., 233 S. W. 271, where the opinion, after quoting section section, states, l. c. 273:

> "The language of this section clearly indicates that it was the intention of the Legislature that in a common school district the authority to select a schoolhouse site be vested in the resident taxpayers of the district assembled in annual meeting, but that in a city, town or consolidated district such authority be vested in the board of education."

The legislature, in the Laws of Mo., 1939, at page 705, reenacted Section 9282 with a slight amendment. This section authorizes an election in a newly created school district because of division or consolidation to hold a special meeting which is vested with the same powers as the annual meeting. This is for the evident purpose of permitting the new district to choose the location for its schoolhouse, and supports the view above taken by the St. Louis Court of Appeals. This is doubtless the "special meeting" referred to in Section 9215, R. S. Mo. 1929, which relates primarily to condemnation proceedings.

CONCLUSION

In view of the foregoing authority and statutory provisions, it is the conclusion of this department that a common school district may change the location of a schoolhouse site only at an annual election, in compliance with the provisions of Section 9284, R. S. Mo. 1929.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

APPROPRIATIONS: Section 44c of Article IV, of the Constitution of the State of Missouri, constitutes an appropriation for the payment of principal and interest on Soldier Bonus Bonds without legislative action.

September 13, 1940

9-13

FILED
98

Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of September 11, 1940, requesting an opinion of this department, which is as follows:

> "The State Board of Fund Commissioners has authorized the issuance of a State Auditor's Warrant in the sum of $50,000.00 chargeable to the Soldier Bonus Interest and Sinking Fund in payment of $50,000.00 Soldier Bonus Bonds issued by said Fund Commissioners, dated October 1, 1939, and maturing October 1, 1940.
>
> These bonds were issued under the provisions of Section 44C, Article 4 of the Constitution of Missouri, for the purpose of winding up the payment of Soldier Bonus claims under the provisions of that constitutional act. No appropriation was requested of the last General Assembly for the reason that the State Board of Fund Commissioners did not contemplate the necessity of issuing additional bonds under the provisions of Section 44C of Article 4 of the constitution.
>
> We would appreciate your opinion as to whether or not the bonds above described can be paid from the Soldier Bonus Interest and Sinking Fund without the legislative appropriation."

Section 44c, Article IV, of the Missouri Constitution (15 Mo. St. Ann., page 482) provides in part as follows:

> "All of the provisions of said act shall apply to and govern the issuance and payment of the principal and interest of the bonds herein authorized and the disbursement of the proceeds thereof without further legislative action, except that the interest on said bonds may be payable at such times and at such place or places as may be designated by the said board of fund commissioners; said board shall pay all expenses of issuing and marketing the bonds out of the proceeds of the sale thereof. (Submitted by the constitutional convention and adopted Feb. 26, 1924.)"

Your question is limited to the single purpose as to whether or not a legislative appropriation is a prerequisite to the payment of principal and interest on Soldier Bonus Bonds issued under the provisions of Section 44c, Article IV, of the Missouri Constitution, supra. The bonds in question were dated October 1, 1939, will become due and payable on October 1, 1940, and were issued under the authority of the State Board of Fund Commissioners pursuant to Section 44c of Article IV, of the Constitution of the State of Missouri.

It is the opinion of this department that by the foregoing provision the Constitution has, by a specific direction, appropriated the revenue derived from the levy and collection of a direct tax upon all of the taxable property in the state to pay the principal and interest on the bonds issued pursuant to the above section of the Constitution. We are advised that there are ample funds available to pay said bonds and interest at this time. It is our view that, under the provisions of the above section of the Constitution, the money stands appropriated to authorize the payment of the maturing principal and interest, notwithstanding the fact that no appropriation was requested or made by the General Assembly.

The general rule on this subject is stated in 59 C. J.:

> "Constitutional provisions are not to be construed as themselves making appropriations unless they are clearly so intended. Self-executing provisions of the constitution specifically appropriating particular funds or sums for designated purposes exempt the matters therein dealt with from the necessity of legislative appropriation established by other provisions of the constitution, and the constitutional provisions are themselves a sufficient appropriation for the purposes and to the extent comprised within their terms; and no legislation may be enacted such as will impair the operation of a constitutional appropriation."

Cases from several jurisdictions are cited in support of a portion of the above statement holding that the constitutional provisions are themselves sufficient appropriation when the purpose to appropriate is clear. Section 44c of Article IV, of the Constitution, is plain and unambiguous, and the purpose to appropriate is clear.

The Supreme Court, in the case of State ex rel. McKinley Pub. Co. v. Hackmann, State Auditor, 282 S. W. 1007, construing a similar section of the Constitution, held, at page 1013:

> "It does appropriate without further legislative action that portion of the money received from automobile license fees which remains after deducting the cost of collecting the tax and maintaining the highway commission, and it appropriates the re-

> mainder to the payment of the principal and interest of certain bonds. It makes no attempt whatever to appropriate without legislative sanction the amount needed for the expenses of the commission. Who, therefore, is to determine the amount required to maintain the highway commission? Is this to be determined by the highway commission, unhampered by legislative permission, or by the Legislature in the regular way by an appropriation act?
>
> Section 19, article 10, of the Constitution of Missouri, expressly provides that no money shall be paid out of the state treasury, except in pursuance of an appropriation by law. This section controls, unless modified by a later constitutional provision. It is true that section 44a, supra, does modify it as to that portion of the automobile license tax to be paid upon the principal and interest of said bonds, but that is the only modification, * * * "

It is our opinion that the above statements of the Supreme Court as to the construction of Section 44a apply to the construction of Section 44c, and we note that both sections 44a and 44c contain the same language, "without further legislative action," referring to the payment of principal and interest on the bonds.

It is therefore the opinion of this department that the State of Missouri World War Soldier Bonus Bonds, Series of 1939, in the aggregate amount of $50,000.00, issued pursuant to Section 44c of Article IV, of the Constitution of Missouri, may be paid from the Soldier Bonus Interest and Sinking Fund pursuant to the Constitutional appropriation found in that section authorizing the payment of such principal without further legislative

action from the proceeds derived from the levy and collecting from a direct annual tax upon the taxable property in the state to pay the principal and interest of said bonds.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

CRH:VC

TAXATION AND REVENUE: Collector may make record of redemption of certificate when redemption thereof is made and the certificate holder has no further interest therein.

12-2

November 28, 1940

FILED 18

Honorable Conn Withers
Prosecuting Attorney
Liberty, Missouri

Dear Mr. Withers:

We desire to acknowledge your request for an opinion, which is as follows:

"This is to request the opinion of your Department on a matter which might involve expenditures to be audited under the County Audit system which require the interpretation of your Department. The facts upon which the opinion is requested are contained in a letter addressed to me by the County Collector of Clay County, Missouri which reads as follows:

'Dear Sir:

On November 7, 1938, I offered for sale various properties for delinquent taxes and sold same as provided for in Section 9953A of the 1933 Session Acts. These properties having been advertised and offered at the 1936 and 1937 sale and no bid sufficient to pay the total amount of taxes and cost being received, they were again advertised and offered in 1938 and sold to the highest bidders and certificates of purchase issued thereon.

In various cases the owners of properties have redeemed these outstanding certificates as provided for in Section 9953B of the 1933 Session Acts.

One of the holders of said certificates of purchase refuses to surrender said certificates held by him, even though he has been notified by registered mail of the redemption of the said certificates, contending

that he has a lien on properties covered by said certificates of purchase until all taxes that were charged against these properties are paid.

Citing three specific redemptions of properties as sold under Section 9953A and redeemed under Section 9953B as to how these properties were redeemed, I give the following:

(1) Certificate of Purchase No. 556 was issued under Section 9953A on a bid of $2.00 covering property that had unpaid taxes amounting to $255.15. That Certificate of Purchase was redeemed under Section 9953B by the owner and he then appeared before the County Court and secured a compromise on the delinquent taxes on the grounds that the property was not worth the amount of taxes, penalties, interest and cost delinquent thereon.

(2) Certificate of Purchase No. 537 was issued under Section 9953A on a bid of $1.00 covering property that had unpaid taxes amounting to $55.24 due thereon. The owner redeemed this Certificate of Purchase and paid all delinquent taxes due thereon at the time of redemption.

(3) Certificate of Purchase No. 552 was issued under Section 9953A on a bid of $1.00 covering property that had unpaid taxes amounting to $302.43 due thereon. The owner redeemed this Certificate for its face value on October 11, 1940, and as yet has not paid the remaining amounts due that were not paid by the proceeds of the sale.

In each case of redemption the owner of the Certificates of Purchase has been notified by registered mail of said redemption and requested to surrender said certificates to this office and be paid the original price plus interest, as provided for in the

> Certificate, figured from the date of the sale to the date of redemption, but in each case, has refused to surrender said certificates.'
>
> "I am hereby requesting an opinion as to whether or not I am in a position to start proceedings in an effort to force the holder of these certificates to surrender same and, if so, what procedure should be followed and who is responsible for the cost of said proceedings."

In answer to the above opinion we are enclosing you an opinion rendered by this Department to Mr. Charles S. Greenwood, Prosecuting Attorney of Livingston County, on November 25, 1940.

The above opinion merely passes on the question as to the rights of the County Court in compromising delinquent taxes on real estate prior to the offering of such lands for sale, and after such lands have been sold and redeemed from a third sale.

Section 9956a Laws of Missouri 1933, at page 437, is in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his

heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposi for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased wi hin six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Section 9956d thereof is as follows:

"When lands sold for taxes, or any portions thereof, shall be redeemed, the county collector shall insert a memorandum of such redemption on the record of the certificate of purchase applicable thereto, stating the quantity or description of the portion redeemed, if not the whole, the date thereof, and by whom made, and sign the same officially, and shall likewise give a certificate thereof to the person redeeming. The person redeeming shall then present to the county clerk the certificate of redemption and the county clerk shall then enter on his record of sales of land for delinquent taxes the recital of such redemption, the date thereof, and the person redeeming."

The right of the certificate holder in such sale has been passed on by the Supreme Court of this State, which construed a summary law similar to the present summary delinquent tax law.

In the case of Hilton v. Smith 134 Mo. 499, 509, 510, the court laid down the following rule with reference to the rights of the certificate holder:

"At the time the back tax suit was commenced interpleader Smith held certificates of the purchase of the land at collector's

sales for taxes levied for the years 1874 and 1875. The time allowed by the law (Wag. Stat., p. 1202, sec. 208) in which the owner could redeem had expired and he was, and for some time had been, entitled to a deed.

"What title to, interest in, or lien upon land a certificate of purchase secures to the holder is a question upon which there is a difference of opinion. It may be said generally that the right is no larger than the statute gives. The law of 1872 only gives the right to the redemption money in case the land is redeemed, and to a deed when the time of redemption has expired.

"In the absence of provisions of law defining the rights of the holder of a certificate of purchase the generally accepted rule is that, until the delivery of a deed, he takes no title to the land, either legal or equitable. Black on Tax Titles, sec. 322; Burroughs on Taxation, p. 321.

"The rule is announced by this court in Donohoe v. Veal, 19 Mo. 335, 336, as follows: 'If the law did not propose to give the purchaser the title to the land until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period, and the right of the purchaser was to receive his money, with a high penal interest, during the delay of redemption. It appears very clearly to be the design of these two acts, that the title of property sold for taxes shall remain undisturbed, until the deed is actually executed by the register; and that, until that act is performed, the title is in the former owner.'
* * * *

"After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. The law thereafter gives him no lien upon the

land for any sum, except that, in case his title fails, he may secure a lien under section 219, 2 Wagner's Statute, page 1206. Pitkin v. Reibel, 104 Mo. 511.

CONCLUSION

Therefore it is the conclusion of this Department that the holder of a certificate issued at a sale of lands for delinquent taxes, having a mere naked right to demand and receive a deed from the the Collector after the period of redemption, when redemption is made within the time and in the manner provided by statute, such naked right ceases and the Collector has no duty other than to make a record provided in Section 9956d, supra. When such record is made by such Collector the certificate holder has no right to any further claim of interest in and to the real estate for which the sale was had.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

SVM/mc
Enc

AGRICULTURE:
PAYMENT FOR NEAT CATTLE CONDEMNED ON ACCOUNT OF TUBERCULOSIS:
IN WHAT COUNTY:

County court in the county in which the owner resides liable for the payment for neat cattle which are condemned on account of tuberculosis.

March 27, 1940

3-28

FILED
99

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following statement of facts:

> "I would like to have an opinion on the following set of facts:
>
> "A person claiming to be a resident of Cole County, owned a herd of cattle, kept in Boone County, discovered in November 1939 that part of said herd was infected with tuberculosis, and proceeded to dispose of the same under the provisions of Section 12530, R. S. Mo. 1929, and is now making claim of Cole County for 1/3 of the appraised value as made under said Section. The person has not paid taxes on the cattle in Cole County, but did, in December 1939, list the same on his 1940 assessment. Taxes for the year 1939 are claimed to have been paid in Boone County. The person in question formerly resided in Jackson County and voted there, but states that the last time he voted there was in 1938, and claims Jefferson City, Missouri as his residence, but has never voted here, but has recently registered here. The question is whether

> or not Cole County is liable under Section 12530, R. S. Mo. 1929 for 1/3 of the value determined under said Section."

That part of Section 12530, Laws of Missouri 1939, page 233, which is applicable to your question, provides as follows:

> "When neat cattle are condemned on account of tuberculosis in this State, in cases not under State and Federal co-operation, and when the owner thereof elects to have any such cattle appraised and killed, a (a) representative of said Department of Agriculture, or at the direction of said Commissioner, a member or representative of the County Court in which such neat cattle are located, acting (b) with the owner thereof shall constitute an appraising committee of two. In case of disagreement a disinterested third party shall be called in as a member of said appraising committee, and a majority vote of such committee as thus constituted shall determine the appraisement of such neat cattle. In making the appraisement each individual head of such cattle shall be appraised at its actual value, giving due consideration to breeding value, as well as to dairy or meat value. An itemized statement of the appraisement of such animal or animals in each lot so appraised shall be prepared in duplicate and signed by each member of the appraising committee on blanks furnished for this purpose by said Department of Agriculture, and one copy shall forthwith be forwarded to the Commissioner of Agriculture and one copy to the

> County Clerk of the County in which the owner resides. Thereafter such diseased cattle shall be sent to slaughter and a report of the net sum of the salvage thereof resulting from the sale of such cattle shall be ascertained by said Commissioner and deducted from the appraisement of said cattle, and (a) the State and (b) the County, in which the owner of said condemned cattle is a resident, shall each pay a like amount which shall be not to exceed one-third of the difference between the appraised value of said condemned cattle and the salvage thereof: * * * * * * * "

This section plainly states that the county court in which the owner resides is the one to which the statement of the appraisement is to be presented and paid. The fact that the party to whom you refer in your request has paid taxes in other places would not necessarily control the place of his residence. Residence is a matter of intention and is generally shown by facts and circumstances, and the fact that a person votes at a certain place and pays taxes thereat is quite conclusive that that is his legal residence for all intents and purposes. A person may have a domicile in one place and a legal residence in another.

We think the rule which we have been trying to discuss is more fully stated in Volume 61 Corpus Juris, page 512, Section 624:

> "While there is authority for the view that a person may be domiciled in one place and yet have a residence in another for purposes of taxation, ordinarily a person has only one domicile or residence for such purposes, and where a person has more than one place of abode, ordinarily the question as to which one is his domicile or residence for purposes of taxation depends on his bona fide intention, his

> acts and conduct being the best evidence as to his selection. Thus, if the taxpayer has two residences in different taxing districts or in different states, as, for example, a summer and a winter home, or two homes kept open the year round, he is taxable at that place which was originally his domicile, provided the opening of the other home has not involved an abandonment of the original domicile and the acquisition of a new one, or at that place which he regards and claims as his domicile or his legal or permanent residence, as shown by his keeping the main part of his establishment there, holding office, voting, causing his property to be assessed for taxes there, or by similar conduct. * * * * * * * * * "

Section 623 of said Volume at page 511, lays down the rule on what constitutes a residence and the determination thereof in the following language:

> "A person's domicile for purposes of taxation is his fixed and permanent home, to which he always has the intention of returning when absent from it, although he may take up a temporary or transient residence elsewhere; the term imports a legal relation between a person and a particular place, based on actual residence with intention to remain there. The question as to the meaning of the term 'residence,' where the construction of a taxing statute is involved, is to be determined in the light of the legislative purpose and the context. According to some cases, 'residence,' within the meaning of such a statute, is the place where the taxpayer lives and where he claims that his home or domicile is, a place of abode as distinguished

> from a temporary sojurn or from a temporary residence; and it has been held that an 'inhabitant' of a state means something more than a person who has a mere temporary residence. * * * * * * * * * * "

Under Section 9756, as amended in Laws of Missouri 1937, page 570, it will be seen that the law imposes the duty upon the county assessor to call upon the taxpayer at his place of doing business, or residence, for the purpose of listing the property for taxation. So it would seem that if this person, to whom you refer in your request, at the time of the appraisal of his herd of cattle, was a resident of Cole County, then under said Section 12530 the obligation to pay one-third of the value determined by said appraiser would be upon Cole County.

CONCLUSION.

It is, therefore, the opinion of this department that if the person whose cattle were found infected with tuberculosis claimed Cole County as his residence at the time the cattle were appraised, then the obligation to pay one-third of the value of such cattle would be upon Cole County.

We are further of the opinion that the question of this party's residence may be determined by facts and circumstances, and since this opinion is only for the purpose of passing upon the law, the question of whether or not this person was a resident of Cole County at time aforesaid is not being determined by this opinion.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

FICTITIOU[S] NAMES: More than one pers[on] may register the same fictitious na[me].

June 7, 1940

6-10

FILED

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated June 6, 1940, as follows:

> "I would like to have an opinion on the following set of facts;
>
> An individual doing business under a fictitious name has registered that name with The Secretary of State as provided by sections 14342-14346 of the Revised Statutes of Missouri. Now a second individual wishes to register under the same name. Can more than one individual register under the same name? Is it discretionary with the Department of State to accept such registration or is the name registered upon the filing of the affidavit and the presentation of the registration fee? I would also like to know if this second individual who has attempted to register under a name that has been adopted, previously, would be acting in violation of the above section of our statutes if he engaged in business under the name he presented for registration."

The two statutes which must be considered are Sections 14342 and 14343, R. S. Mo. 1929, which are as follows:

"Sec. 14342. Fictitious names. -- That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required.

Sec. 14343. Registration required, when -- how. -- Every person who shall engage in business in this state under a fictitious name or under any name other than the true name of such person shall, within five days after the beginning or engaging in business under such fictitious name, register by verified statement of all parties concerned, upon blanks furnished by the secretary of state, such name in the office of the secretary of state, together with the name or names and the resident of each and every person or corporation interested in or owning any part of said business, and setting forth the exact interest therein of each and every such person or corporation: Provided, that if the interest of any person named in the original registration of such fictitious name shall change or cease to exist, or any other person shall become interested therein, such fictitious name shall be reregistered within five days after any change shall take place in the ownership of said business or any part thereof as set forth in the original registration, and such reregistration shall in all respects be made as in the case of original registration of such fictitious name: Provided, that the provisons of this section shall not apply to farmers'

> mutual insurance companies nor farmers' mutual telephone companies."

There is no language in either of the above sections, or in any of the other sections under the same title, indicating that there may not be similar names registered under these sections. There are several cases in which the "fictitious name" statutes have been discussed and an effort made to determine the legislative intent. In all of these cases, the courts have emphasized that these statutes are not an attempt to restrict business in any manner, and all recognize the rule that the right to do business under any name, in the absence of fraud, is inherent in every person and partnership.

The statutes are fully discussed in Ditzell v. Shoecraft, 274 S. W. 880. In that opinion, we find the following, l. c. 883:

> "Under points and authorities, plaintiffs charge that the court erred in admitting evidence concerning the failure of consideration, and in giving respondent's declarations of law (a) to (g), inclusive, and in effect declaring void and forfeiting all contracts and transactions of those engaged in business using a trade-name without registering it. In support of this contention it is asserted that the language and purpose of the act proclaim that it is a regulation to secure registration, not to restrict business; an enactment for the benefit of those extending, not those securing, credit. It is an elementary rule that, in construing a statute, its purpose must be examined, the evils it is intended to correct, and the extent of the whole act, its history, and practical intent.

It has been held that the right to do business is inherent in every person and partnership, and, in the absence of fraud, any name may be used. Palmer v. Leivy (Mo. App.) 205 S. W. 244. The powers of the Legislature are narrowly confined. It has power to regulate but not to prohibit business. The purpose of the act is clearly defined in the legislative declaration relative thereto, which is found in Session Laws of 1919, p. 622, sec. 7, as follows:

'Whereas there is no adequate law in this state governing the transaction of business under a fictitious name, and whereas hundreds of thousands of dollars are annually lost to honest business by the use of fictitious names, and, whereas the use of a fictitious name affords a convenient vehicle for the perpetration of fraud an emergency is declared to exist within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its approval.'

Nothing could be more clear than this plain declaration as to the purpose and scope of the act. Its history may be stated briefly as follows: It was introduced into the House of Representatives as House bill No. 675, and, as introduced, contained sections 1 to 7. Section 3 made failure to register, as required by the statute, a complete defense for the recovery of money by persons using fictitious name. This section, in its entirety, was stricken out by the House, and the bill was passed with its original sections intact save section 3. The original bill also, in section 5 thereof, made the violation of the act a misdemeanor punishable by a fine of $10 to $50; this section,

> however, was amended by striking out the fine, thus leaving a violation of the act a misdemeanor, which under the general statute carries a maximum fine of $1,000, or a year's imprisonment, or both. Section 3701, R. S. 1919.
>
> It seems evident to us that the intent of the Legislature was to restrict the penalty for violation of the statute to a fine or imprisonment, or both, as provided in misdemeanor cases (section 3701), and that those violating the act were not to be further punished by having all their rights forfeited.
>
> *
>
> A few jurisdictions, in construing similar statutes, hold the contracts void. But a majority, Missouri included, have held that such a statute, containing a prohibition, and making its violation a misdemeanor, is for the benefit of those giving credit to one using the fictitious or assumed name, and not for the protection of those procuring credit from persons violating the law." (Italics ours.)

The portion of the opinion which we have underlined seems to indicate that an attempt by the legislature to limit the use of any fictitious name to one individual would be invasion of his rights under our system of government.

In Palmer v. Leivy, 205 S. W. 244, cited in the above opinion, we find the following, l. c. 248:

> "'If a man signs a bond by a name by which he was never called or known, or which he had never used before, he would be bound by it.' Thomas v.

Wyatt, 31 Mo. 188, loc. cit. 192, 77 Am. Dec. 640. Matters of contract may be entered into by a person by any name he may assume. Taylor v. Bowen, supra, loc. cit. 620."

A search of all other cases in which the "fictitious name" statutes are discussed fails to reveal that the courts have attempted to add to said statutes to prevent the use of the same fictitious name by more than one person. While it seems to us that the public might be best served and fraud prevented by restricting the use of a fictitious name to one individual or partnership, it is apparent that the legislature, so far, has not attempted to do so, and as far as our search reveals, any number of persons may register the same fictitious name.

It is our conclusion that the Secretary of State should accept the registration of a fictitious name even though another person has previously registered the same fictitious name with that official.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC

ELECTIONS: CORRUPT PRACTICE ACT: Candidate should include in expenses obligations incurred by others known and authorized by him; (2) candidate changing headquarters from one locality to another must include expense of both headquarters in statement; (3) expense of raising funds should be included in the statement.

August 27, 1940

9/4

FILED
99

Honorable Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

On August 26th, you submitted to this department three questions relating to what is commonly called the corrupt practice act, being Article XIV, Chapter 61, R. S. Mo. 1929. The questions relate specifically to Sections 10481 and 10482. For convenience, we are segregating the questions and will answer them individually, the first question being as follows:

> "(1) If a person ostensibly in control of the conduct of a campaign incurs a substantial expense in long distance telephone calls and telegraphic communications, which were unauthorized by the candidate or his campaign director, who was in actual control of the campaign, are all these items deemed a part of the campaign expenditures or are they items exempt under our statutes?"

The pertinent part of Section 10481 is as follows:

> "No candidate for congress or for any public office in this state, or in any county, district or municipality thereof, which office is to be filled by popular election, shall by himself or by or through any agent or agents, committee or organization, or any person or persons

> whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute or expend any money or other valuable thing in order to secure or aid in securing his nomination or election, or the nomination or election of any other person or persons, or both such nomination and election, to any office to be voted for at the same election, or in aid of any party or measure, in excess of a sum to be determined upon the following basis, namely: For five thousand voters or less, two hundred dollars; for each one hundred voters over five thousand and under twenty-five thousand, four dollars; * * * "

The purpose of the above sections is to limit the expenditures of a candidate for any office and for the determination of the amount that he may expend. Section 10482 R. S. Mo. 1929, prohibits the issuance of a certificate of election to any successful candidate in any election until he has filed a statement of his expenditures with the officer empowered by law to issue his certificate of election. We herewith quote the pertinent part of said section:

> "Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the

> certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and, to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised."

The portion of the section which refers to expenditures appears to include all sums of money, except all sums paid for actual traveling expenses including hotel or lodging bills. We, therefore, come to the conclusion that the only exemption under the statute for any sum expended is for traveling and hotel expenses. Apparently, every other expenditure must be reported in the absence of any exemption which we may make in this opinion.

You use the word "ostensibly" in your letter. The question arises as to whether the candidate actually knew or did not know or did not bear or obligate himself for the expenses incurred for long distance telephone calls and telegraphic communications by the person in control. Ostensible means capable of being shown, exhibited, declared, avowed or apparent. Therefore, we conclude that the candidate was apparently aware that the person was incurring expenses

of the nature mentioned in your letter. However, you state the expenses were unauthorized by him or his campaign director. If the expenses were unauthorized, we logically conclude that the candidate did not obligate himself or did not have knowledge at the time such expenses were being incurred. Irrespective of the question as to whether or not the expenses should be reported, we are of the opinion that in the event such expenses are not reported, the candidate does not forfeit his office under Section 10482. We base this conclusion on State ex inf. v. Bland 144 Mo. 534, l.c. 556:

> "It will be observed that it is not charged that Bland himself or any other person for him with his knowledge or consent spent more money than the law permits. The allegation is that what he spent and what his friends spent, partly with his knowledge and partly without his knowledge, exceeded the legal limit. It needs no deep discernment to see that if the expenditure of money for a candidate without his knowledge or consent would work a forfeiture of his office, an officer might be ousted for acts done by others beyond his control and without his knowledge. Under such a construction of the statute no man, however honest or law-abiding, would ever have a safe tenure of office, for if he can be ousted because of the acts of others done without his knowledge, then in order to accomplish this purpose it could only be necessary for some evilminded or designing person to spend enough money added to the amount the officer had legitimately spent, to exceed the limit, and the innocent officer would lose the office to which the people had elected him. This is a reductio ad absurdum, but it points extremities to which we would be led if the sixth

> charge was held good. No man was ever punished or deprived of an office for an act he did not commit himself or which was done without his knowledge or consent, where the integrity of the voter's will was not violated or the legality of the election itself was not questioned. It is too plain for argument therefore that the sixth charge states no cause of action against the defendant."

Our final conclusion is as follows: If the candidate did not have knowledge, did not obligate himself, did not give the person in question authority or make any agreement that such person was acting in his behalf rather than from the standpoint of friendship or a zealous interest in his candidacy, then such items of expense as were incurred by the person are not deemed a part of the campaign expenditures and need not be reported. On the other hand, if the reverse of the conditions as mentioned above be true, then such candidate should make a report of such expenditures made by the person. Incidentally, we pass on the question of whether or not the person who incurred the expenses listed in your question should make a report. We think this is determined by Section 10492, making it imperative that two or more persons, who shall be elected, appointed, chosen or associated for the purpose, wholly or in part, of raising, collecting or disbursing money, or of controlling or directing the raising, collecting or disbursement of money for election purposes, shall be deemed a political committee and be subject to the provisions of Section 10494. This section makes it necessary for such committee, club or aggregate of persons to make a report. Otherwise, the person in question, as an individual, need not make any report of the expenditures for telephone or telegraphic communications.

II.

Your second question is as follows:

> "If a candidate establishes his campaign headquarters in one locality, honestly intending to operate therefrom, but he soon finds out he has erred in judgment and establishes headquarters in another locality, is the outlay incurred on the former deemed 'a campaign expense item' which he is required under the law to set forth in his statement, or may he disregard that wasted amount without rendering an accounting thereof?"

Referring again to Section 10482, the statute provides that a candidate for the offices mentioned therein file a statement in writing under oath setting forth all sums of money contributed, disbursed, expended or promised by him and by any other person or persons in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election. The statute makes no exemption for any mistake or policy of expenditure by a candidate. It is assumed that all expenditures made by a candidate are for the purpose of promoting himself as a candidate in a primary or general election. Evidently, the candidate in question, when establishing his original headquarters, intended to make the same his permanent headquarters. Whatever money he spent in establishing such headquarters, whether said headquarters were successful or unsuccessful, was spent with the intent and purpose of promoting his candidacy. We are, therefore, of the opinion that under such circumstances the candidate should report the expenditures incurred in establishing his original headquarters, as well as the expense of his permanent headquarters.

III.

The third question is as follows:

> "(3) Where a candidate simultaneously conducts two independent campaigns, one to raise funds with which to carry on his political campaign, the other actually conducting his campaign, are the items of

expense incurred in raising of funds deemed expenses such as he would be required to set out as 'a campaign expense item' or may he disregard that as items totally unrelated to his political campaign. The candidate maintains one staff of clerks for the raising of funds, incurs printing and postage for that purpose, and he also maintains another staff to conduct his political campaign?"

Applying the same logic as contained in your question two, we are clearly of the opinion that both campaigns, one for the raising of funds, the other for actually promoting his candidacy, are expenses which should be included in Section 10482. It is a well known fact that candidates for major offices have various committees, such as financial, publicity, etc. They are formed for the purpose of promoting his candidacy and all expenses by any of such committees are expenses which bear directly on his candidacy.

We, therefore, conclude that in view of the fact that no hair-splitting distinctions can be made on expenses incurred in the manner which you have described, such expenses should be included in a statement to be made by the candidate under Section 10482.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

OWN:RT

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

PROBATE JUDGES: Probate judge appointed by the governor holds office until the next general election, and in the event of his defeat for the unexpired term relinquishes the office after the general election.

December 7, 1940

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Honorable Harry Wooldridge
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

This department is in receipt of your letter of November 29, 1940, wherein you make the following inquiry:

> "I have the question of when the newly elected Probate Judge should take office. The present Probate Judge was appointed by the Governor about a year and a half ago, and was defeated in this election for the unexpired term.
>
> I am of the opinion that Section 10216 R. S. Mo. 1919 govern, and therefore the newly elected official should take office on the first Monday in January. I am told that the Republican lawyers say this section does not apply in this instance and their man can take over the office immediately.
>
> I would appreciate hearing from you in regard to this matter."

Section 2047 R. S. Mo. 1929, deals with the election

of probate judges. Section 2048 refers to the vacancies in the office of probate judge, and is as follows:

> "When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

We are primarily concerned with the clause "shall continue in office until the next general election". Does it mean that the person who is elected to the office of probate judge assume his office on January first as provided in Section 10216, or after November fifth or as soon as he is able to qualify? We think Section 10216 is a general section covering all situations wherein there is not a special section governing vacancies when they occur in a particular office. Section 2048, quoted supra, must be considered a special section governing vacancies in the office of probate judge. The general rule supported by decisions is to the effect that when two sections dealing with the same subject matter, one general in nature and the other special in nature, the special section takes precedence over the general section. (State ex. inf. vs. Amick 247 Mo. 271) A similar situation refers to the circuit and county clerks. The statutes governing vacancies in those offices have the same clause as contained in the section relative to vacancies in the office of probate judge. In the case of State ex. inf. vs. Amick mentioned above, a controversy arose over a similar clause as contained in the statute relative to probate judges. The section has since been repealed, but the court passed on the question of when the circuit judge elected to fill an unexpired term assumed his office, and it is therefore applicable to the question which you present.

After an attempt to harmonize the sections dealing with vacancies in the office of circuit judge and setting forth the requirements of statutory construction, the court concludes as follows, l.c. 294:

> "We are clearly of the opinion that upon both principle and authority respondent's term of office expired on the date following the general election held on November 5, 1912."

Other decisions which bear on the question are State ex. inf. vs. Koeln 270 Mo. 174 and State vs. Schweitzer 258 S. W. l.c. 439.

CONCLUSION

In view of the language of Section 2048 and the construction as placed upon it by the courts, we are of the opinion that the probate judge elected at the last general election to fill the unexpired term can assume office upon qualifying any time after November 5, 1940.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
OWN:RT